

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,
Plaintiff in Error,

vs.

E. A. FARRINGTON and L. A. HOUCK, co-partners, doing business under the name and style of Pacific Transfer Company; J. DANIELS, H. SANDGATHE, doing business as Springfield Garage; V. W. WINCHELL and F. M. HATHAWAY, co-partners doing business under the name and style of Eugene Ford Auto Company, and A. WILHELM and JOHN DOE WILHELM, co-partners doing business under the firm name and style of A. Wilhelm & Son, Defendants in Error.

TRANSCRIPT OF RECORD
ON WRIT OF ERROR.

To the District Court of the United States for the
District of Oregon.

Filed

No. _____

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vs.

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GATHE, doing business as Springfield
Garage; V. W. WINCHELL and F. M.
HATHAWAY, co-partners doing busi-
ness under the name and style of Eu-
gene Ford Auto Company, and A.
WILHELM and JOHN DOE WILHELM,
co-partners doing business under the
firm name and style of A. Wilhelm
& Son, Defendants in Error.

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*United States Circuit Court of Appeals for the
Ninth Circuit*

FORD MOTOR COMPANY, a corporation,
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vs.

E. A. FARRINGTON and L. A. HOUCK, co-
partners, doing business under the
name and style of Pacific Transfer
Company; J. DANIELS, H. SAND-
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ness under the name and style of Eu-
gene Ford Auto Company, and A.
WILHELM and JOHN DOE WILHELM,
co-partners doing business under the
firm name and style of A. Wilhelm
& Son, Defendants in Error.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

E. L. McDougal, N. W. Bank Bldg, Portland, Oregon
Platt & Platt, Platt Bldg., Portland, Oregon,
L. B. Robertson and Alfred Lucking, Detroit, Mich.,
For the Plaintiff in Error.

Logan & Smith, Portland, Oregon,
C. A. Hardy and L. Bilyeu, Eugene, Oregon,
For the Defendants in Error.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

FORD MOTOR COMPANY, a corpora-
tion,

Plaintiff in Error,

vs.

V. W. WINCHELL and F. M. HATH-
AWAY et al.,

Defendants in Error.

CITATION ON WRIT OF ERROR

United States of America,
District of Oregon, ss.

To V. W. Winchell and F. M. Hathaway,
Greeting:

You, and each of you, are hereby cited and admon-
ished to be and appear before the United States Circuit
Court of Appeals for the Ninth Circuit, at San Fran-
cisco, California, within thirty days from the date hereof,
pursuant to a writ of error filed in the Clerk's office of
the District Court of the United States for the District
of Oregon, wherein Ford Motor Company is plaintiff
in error and you are defendants in error, to show cause,
if any there be, why the judgment in the said writ of
error mentioned should not be corrected and speedy jus-
tice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District,
this 10th day of February, in the year of our Lord, one
thousand, nine hundred and seventeen.

R. S. BEAN,
Judge.

Filed February 12th, 1917.

G. H. MARSH, Clerk.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

Ford Motor Company, a corporation,
Plaintiff in Error,

vs.

V. W. Winchell and F. M. Hathaway, et al.,
Defendants in Error.

WRIT OF ERROR

The United States of America, ss.

The President of the United States of America.

To the Judge of the District Court of the United States
for the District of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between Ford Motor Company, a corporation, plaintiff, and plaintiff in error, and V. W. Winchell and F. M. Hathaway, defendants, and defendants in error, a manifest error has happened to the great damage of the said Ford Motor Company, a corporation, plaintiff, and the plaintiff in error, as by its complaint appears, we being willing that error, if any there has been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together

with this writ, so that you have the same at San Francisco, California, within thirty days from this date, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglas White,
Chief Justice of the United States, this 10th day of
February, A. D. 1917, and in the one hundred forty-first
year of the Independence of the United States of
America.

G. H. MARSH,

Clerk, United States District Court, District of Oregon.

Allowed by

R. S. BEAN,

United States District Judge.

Filed February 10th, 1917.

G. H. MARSH, Clerk.

Service of the foregoing Writ of Error made this
10th day of February, 1917, upon the District Court
of the United States for the District of Oregon, by filing
with me as Clerk of said Court, a duly certified copy of
said Writ of Error.

G. H. MARSH,

Clerk, United States District Court, District of Oregon.

R. S. BEAN, Judge.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

March Term, 1916

BE IT REMEMBERED, That on the 14th day of August, 1916, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Complaint, which had been duly served upon the defendants named therein, now the defendants in error, on said date, in words and figures as follows, to-wit:

In the District Court of the United States
for the District of Oregon
AT LAW

Ford Motor Company, a corporation,
Plaintiff,

vs.

E. A. Farrington and L. A. Houck, co-partners, doing business under the name and style of Pacific Transfer Company; J. Daniels, H. Sandgathe, doing business as Springfield Garage; V. W. Winchell and F. M. Hathaway, co-partners, doing business under the name and style of Eugene Ford Auto Company, and A. Wilhelm and John Doe Wilhelm, co-partners, doing business under the firm name and style of A. Wilhelm & Son, Defendants.

AMENDED COMPLAINT

Plaintiff complains and for cause of actions, alleges:

I

That it is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Michigan, with its factory and principal place of business at Highland Park, Michigan, and duly authorized to transact business as a foreign corporation in the State of Oregon, with a factory branch and principal place of business in the State of Oregon in Portland, Multnomah County, Oregon.

II

That E. A. Farrington and L. A. Houck are co-partners doing business under the firm name and style of Pacific Transfer Company, and are engaged in the warehouse and transfer business in the City of Eugene, Oregon.

III

That H. Sandgathe is an individual doing business as the Springfield Garage, and is in the automobile business at Springfield, Oregon.

IV

That V. W. Winchell and F. M. Hathaway are co-partners, doing business as the Eugene Ford Auto

Company, and are in the automobile business at Eugene, Oregon.

V

That A. Wilhelm and John Doe Wilhelm are co-partners doing business as A. Wilhelm & Son, and are in the automobile business at Junction City, Oregon.

VI

That heretofore and on or about September 10th, 1915, plaintiff and defendants V. W. Winchell and F. M. Hathaway entered into a contract whereby said defendants were to represent the plaintiff as limited agents. Pursuant to said contract plaintiff consigned to the said defendants in this paragraph mentioned the following numbered Ford automobiles: 1115957, 1116-510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062282, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066343, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067615, Sedan 658934, 1116486.

VII

That thereafter plaintiff, pursuant to the terms of said contract with the defendants mentioned in the last preceding paragraph, duly cancelled said contract and offered \$16,077.50, the money advanced on said consign-

ment of automobiles by the above mentioned defendants to said defendants in payment and satisfaction as provided for in said contract, and that defendants then refused and ever since have refused to receive the same; that the plaintiff was at the time of said tender ready and willing and able to pay said amount thereof to the defendants, and that since said offer plaintiff has been ready, willing and able to pay the sum of thirty-four hundred and one and 12-100 dollars '(\$3401.12), which amount is the defendants' Winchell and Hathaway, property in said cars at this time, and that plaintiff now brings the said sum of thirty-four hundred and one and 12-100 dollars into this Court in this action, ready to be paid to defendants.

VIII

That the amount involved in this action is in excess of three thousand dollars, and within the jurisdiction of this Court.

IX

That at the time of the commencement of this action said automobiles above described are within the State of Oregon and the jurisdiction of this Court, and in the possession of the defendants herein; that the plaintiff is the present owner and entitled to the immediate possession of said automobiles; that demand has been made upon the defendants for the possession of said automobiles and defendants have refused to give plaintiff possession of said automobiles.

X

That said automobiles are of the value of sixteen thousand seventy-seven and 50-100 dollars (\$16,077.50).

Wherefore plaintiff demands judgment against the defendants for the recovery of Ford automobiles as particularly set forth in Paragraph VI of this complaint, or for \$16,077.50, the value thereof; \$1,000.00 damages for the detention thereof; and for the costs and disbursements of this action.

E. L. McDOUGAL,
Attorney for Plaintiff.

State of Oregon,

County of Multnomah, ss.

I, E. L. McDougal, being first duly sworn, depose and say that I am the plaintiff's attorney in the above-entitled action, and that the foregoing proposed amended answer is true as I verily believe; that I make this verification because the attorney-in-fact is without the state and I am acquainted with the facts. (Sgd)

E. L. McDOUGAL.

Subscribed and sworn to before me this 14th day of August, 1916. (Sgd) HOMER T. SHAVER,
(Seal) Notary Public for Oregon.

My commission expires July 19, 1920.

Filed August 14th, 1916.

G. H. MARSH, Clerk.

And on the 14th day of June, 1916, there was duly filed in said Court an Answer, in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

Ford Motor Company, a corporation,
Plaintiff,

vs.

E. A. Farrington and L. A. Houck, co-partners doing business under the name and style of Pacific Transfer Company; J. Daniels, H. Sandgathe, doing business as Springfield Garage; V. W. Winchell and F. M. Hathaway, co-partners doing business under the name and style of Eugene Ford Auto Company, and A. Wilhelm and John Doe Wilhelm, co-partners, doing business under the firm name and style of A. Wilhelm & Son, Defendants.

Come now the defendants and answering the complaint herein admit the allegations contained in Paragraph I, in Paragraph II, in Paragraph III, in Paragraph IV, and in Paragraph V of the Complaint herein.

Deny each and every other allegation contained in said complaint except as hereinafter expressly admitted, and except as hereinafter alleged.

For a further and separate answer and defense to said complaint these defendants allege that V. W. Winchell and F. M. Hathaway prior to the time of the commencement of this action had purchased all the Ford automobiles described in said complaint, and had paid the plaintiff the full purchase price required to be paid from them to plaintiff, and no further payments were to be made thereon; and, thereupon, the plaintiff delivered said automobiles to defendants and title to the same passed from plaintiff to defendants, and defendants became the owners thereof, and prior to the time of the commencement of this action, and at the time of the commencement thereof were, and are now, the owners thereof, and entitled to the immediate and exclusive possession of the said automobiles.

For a further and separate answer and defense to said complaint, the defendants V. W. Winchel and F. M. Hathaway reallege all of the allegations contained in the first separate answer contained therein, and these defendants further allege that ever since the contract mentioned in the complaint was made between plaintiff and these defendants, plaintiff has dealt with these defendants in the sale of automobiles, so that when the defendants paid to plaintiff the amount required to take up the bill of lading sent for collection by the plaintiff with the automobiles delivered by plaintiff to defendants, and paid the freight and draft attached to such bill of lading, delivery was made of said automobiles to defendants and such drafts were drawn by plaintiff against defendants for the full sum required to be paid by defendants to plaintiff as the purchase price of said automobiles, and

upon such payment and delivery plaintiffs have received said automobiles and dealt with the same as their own, with the knowledge and acquiescence of plaintiff; and the contract between plaintiff and defendants ever since the same was made has been construed by the parties, the same being the contract under which plaintiff sold and defendants purchased the said automobiles, so that upon payment of such sight drafts and the delivery of the automobiles upon the payment of the same and the freight, title and delivery to such automobiles was completed and passed from plaintiff to defendants and that all of the automobiles mentioned in the complaint were purchased from plaintiff and paid for by defendants upon the terms hereinafter set forth; and long prior to the institution of this action, and not otherwise; and that at the time of the commencement of this action and for a long time prior thereto defendants were and are the exclusive owners of said automobiles and each one of the same and entitled to the immediate and exclusive possession thereof, and were in the lawful possession thereof at the time of the commencement of this action.

For a third further and separate answer and defense these defendants allege the truth to be: That prior to the commencement of this action and on or about the 29th day of May, 1916, the plaintiff and the defendants V. W. Winchell and F. M. Hathaway had a settlement of the contract existing between plaintiff and defendants wherein and whereby the plaintiff and defendants adjusted their mutual accounts and reciprocal claims, and wherein and whereby the plaintiff agreed that the defendants were the owners of and did convey to defend-

ants V. W. Winchell and F. M. Hathaway all claims of title on the part of plaintiff to the automobiles described in the complaint and each and every one thereof, and relinquished every claim of possession to the said automobiles and each and every one thereof.

For a fourth further and separate answer and defense and counterclaim the defendants V. W. Winchell and F. M. Hathaway allege that during all the time mentioned herein they were, and are now, co-partners doing business under the firm name and style of Eugene Ford Auto Company, and had duly registered their assumed business name with the County Clerk of Lane County, Oregon, and were engaged in a general automobile business in Lane County, Oregon, and engaged in buying and selling Ford automobiles, parts, fixtures, accessories, supplies and materials used in said business and incident thereto.

That at the time of the commencement of this action these defendants were, and are now, the owners of the Ford automobiles mentioned in the complaint and being automobiles numbered and specifically designated in Paragraph VI of the complaint, and being Ford automobiles: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062232, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066345, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, Sedan 658934, 1116486.

That said automobiles were and are of the value of

\$493.25 for each of said cars, except for the Sedan which was and is of the value of \$798.25.

That defendants at the time of the commencement of this action, as such owners of said automobiles, were entitled to the immediate and exclusive possession of the same; and on or about Monday, the 5th day of June, 1916, the plaintiff instituted the above cause and wrongfully and unlawfully and maliciously caused the Writ of Replevin to be issued out of this Court and filed an affidavit and bond thereon and demanded immediate possession of the said automobiles; and at the said time the plaintiff well knew that said automobiles, and each and every one thereof, were the exclusive property of these answering defendants, V. W. Winchell and F. M. Hathaway; and that said defendants were entitled to the immediate and exclusive possession thereof, and plaintiff caused said Writ of Replevin to be issued herein and the said automobiles to be seized maliciously, wrongfully and unlawfully for the purpose of destroying the business of these defendants and injuring their financial standing and credit and depriving them of said property of the value of \$18,555.25, as aforesaid, and to drive them out of business and to prevent them from conducting their automobile and garage business hereinbefore described.

That at said time these defendants had an established business in dealing in automobile accessories, appurtenances and supplies from which they were then making and had been making for several months last past a regular profit of approximately Three Hundred Dollars per month.

That by the wrongful acts of the plaintiff, as herein alleged, the business of these defendants has been destroyed, their business credit ruined, their standing in the mercantile world has been discredited and they have been injured and damaged by the malicious acts of defendants, as alleged, to the sum of Twenty-five Thousand Dollars, in addition to the general damages hereinbefore set forth, to-wit: value of the automobiles and the property aggregating \$18,555.25.

That the plaintiff is a corporation of great wealth and extensive business associations and power in the commercial world, and in committing the acts herein set forth, it has used its wealth, standing and power to harass and annoy these defendants by the issuance of legal process to which plaintiff knew it was not entitled.

WHEREFORE, defendants demand judgment that the defendants V. W. Winchell and F. M. Hathaway have judgment against the plaintiff for the recovery of the Ford automobiles, as particularly set forth in the answer herein, or for \$18,555.25, the value thereof; and for Twenty-five Thousand Dollars damages; and for their costs and disbursements in this action.

I. N. SMITH, L. BILYEU AND THOMPSON &
HARDY, Attorneys for Defendants.

STATE OF OREGON
COUNTY OF LANE—ss.

I, V. W. Winchell, being first duly sworn, depose and say that I am one of the defendants in the above en-

titled action; and that the foregoing answer is true as I verily believe. **V. W. WINCHELL.**

Subscribed and sworn to before me this 13th day of June, 1916. **HELMUS W. THOMPSON,**
(Notarial Seal) Notary Public for the State of Oregon.

My commission expires March 27, 1917.

Filed June 14, 1916. **G. H. MARSH,** Clerk.

And on the 28th day of July, 1916, there was duly filed in said court a Reply to the Answer, in words and figures, as follows, to-wit:

**IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.**

Ford Motor Company, a corporation,
Plaintiff,

—vs—

E. A. Farrington, and L. A. Houck,
co-partners, doing business under the
name and style of Pacific Transfer
Company, J. Daniels, H. Sandgathe,
doing business as Springfield Garage,
V. W. Winchell and F. M. Hathaway,
co-partners, doing business under the
name and style of Eugene Ford Auto
Company, and A. Wilhelm and John
Doe Wilhelm, co-partners, doing busi-
ness under the firm name and style of
A. Wilhelm & Son, Defendants.

Comes now the plaintiff, Ford Motor Company, a corporation, and for reply to the first further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff, replying to the second further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff, replying to the third further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff, replying to the fourth further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

WHEREFORE, plaintiff having fully replied to the further and separate answers and defenses of the defendants, prays judgment as heretofore asked for in the complaint on file herein.

E. L. McDOUGAL,
Attorney for Plaintiff.

STATE OF OREGON
COUNTY OF MULTNOMAH—ss.

I, E. L. McDougal, being first duly sworn, depose and say that I am the attorney for plaintiff corporation

in the above entitled action, that the foregoing reply is true as I verily believe. I further state that I have personal knowledge of the facts herein contained and verify this reply for the reason that the proper officer for service of this corporation is not now within the State.

(Sgd.) E. L. McDOUGAL.

Subscribed and sworn to before me this 28th day of July, 1916.

(Sgd.) F. C. McDOUGAL,

(Seal)

Notary Public for Oregon.

My commission expires July 1, 1920.

AND AFTERWARDS to-wit: On the 6th day of September, 1916, there was duly filed in said court a verdict in words and figures, as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Ford Motor Car Company, a corporation,
Plaintiff,

—vs—

E. A. Farrington and L. A. Houck,
co-partners, as Pacific Transfer Com-
pany; J. Daniels, H. Sandgathe; V.
W. Winchell and F. M. Hathaway, co-
partners as Eugene Ford Auto Com-
pany, and A. Wilhelm and John Doe
Wilhelm, co-partners, as A. Wilhelm
& Son, Defendants.

We, the jury, duly empanelled and sworn to try the above cause, find our verdict for the defendants; and, that the defendants, V. W. Winchell and F. M. Hathaway, co-partners doing business as Eugene Ford Auto Company, were at the time this action was commenced and are now entitled to the immediate possession and are entitled to the return of the Ford automobiles described in the complaint and the answer herein and being the following numbered Ford automobiles, to-wit: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062280, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066345, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, Sedan 658934, 1116486, and in case a return cannot be had we find the value of the said automobiles to be \$16,077.50, and single damages sustained by the defendants, V. W. Winchell and F. M. Hathaway, partners as aforesaid, to be the sum of \$6000.00. GEORGE KEECH, Foreman.

AND AFTERWARDS, to-wit, on Monday, the 11th day of September, 1916, the same being the 60th judicial day of the regular July term of said court; present: the Honorable R. S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

JUDGMENT

Thereupon, on motion of said defendants for judgment on the verdict heretofore filed and entered herein,

IT IS CONSIDERED that said defendants, V. W. Winchell and F. M. Hathaway, co-partners doing business as the Eugene Ford Auto Company, do have and recover of and from the plaintiff, Ford Motor Car Company, a corporation, the immediate possession and return of the Ford automobiles described in the complaint and answer herein, and being the following numbered Ford automobiles, to-wit: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062282, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066345, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, Sedan 658934, 1116486.

AND IT IS FURTHER ORDERED that in case return of said automobiles cannot be had that said defendants, V. W. Winchell and F. M. Hathaway, co-partners, doing business as the Eugene Ford Auto Company, do have and recover of and from the said plaintiff, Ford Motor Car Company, a corporation, the sum of \$16,077.50, the value of the said automobiles, and

IT IS FURTHER CONSIDERED that said defendants, V. W. Winchell and F. M. Hathaway, co-partners, doing business as the Eugene Ford Auto Company, have and recover of and from the said plaintiff, Ford Motor Car Company, a corporation, damages in the sum of \$6000.00 together with costs and disbursements herein taxed at \$68.55,

Whereupon, on motion of said plaintiff,

IT IS ORDERED that it be and it is hereby allowed thirty days from this date within which to file a motion to set aside said judgment and for a new trial herein, and in which to submit a Bill of Exceptions, and

IT IS FURTHER ORDERED that issuance of execution upon the said judgment be stayed until after the termination of the said motion for new trial.

R. S. BEAN, United States District Judge.

Filed September 11, 1916. G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 8th day of November, 1916, there was duly filed in said court a petition for new trial in words and figures, as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Ford Motor Company, a corporation,
Plaintiff,

—vs—

E. A. Farrington, V. W. Winchell
and F. M. Hathaway, et al,
Defendants.

COMES NOW the plaintiff in the above entitled action appearing by Messrs. Platt & Platt and E. L. McDougall, its attorneys of record, and petitions the court for a new trial in the above entitled action and for grounds of such petition alleges:—

I.

That it appears from the undisputed testimony introduced upon the trial of the above entitled cause that the plaintiff was compelled to and did pay to The First National Bank of Eugene, Oregon, three notes of the defendants, V. W. Winchell and F. M. Hathaway, aggregating the sum of \$12,676.38, each of which notes was secured by a chattel mortgage on the automobiles sought to be recovered from the possession of the defendants in the above entitled action, which notes the plaintiff was compelled to pay and did pay in order to free the automobiles in controversy from the liens of the chattel mortgages given to secure said notes, in order to enable it to maintain an action for the replevin of said automobiles, and the court failed and refused to instruct the jury at the trial of the above entitled action that the plaintiff was entitled to off-set the amounts paid in satisfaction of said notes against any amounts which they might find in favor of the defendants and against the plaintiff.

II.

Plaintiff petitions for a new trial in the above entitled action upon the further ground that the verdict of the jury made and entered in the above entitled action, and the judgment entered thereon contravenes the instructions given by the court upon the trial of the above entitled cause in that it allows to the defendants as damages profits on the sales of automobiles in addition to the value of the cars therein and thereby expressly fixed at the sum of \$16,077.50, and said judgment is contrary to

the evidence introduced upon the trial of the above entitled cause in that it appears from the undisputed evidence introduced upon the trial of the above entitled cause and the law applicable to the facts proven as evidenced by the instructions of the court made upon the trial of the above entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above entitled action, and the defendants are not entitled to any damages arising from the action of the plaintiff in terminating its contract or in asserting its right to the possession of the automobiles in controversy, and that no evidence was introduced upon the trial of the above entitled cause upon which any claim for damages for the sum of \$6000, or any sum in excess of \$2414.75 could properly be based, and said verdict and judgment are contrary to the evidence introduced upon the trial of the above entitled cause, and that it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the defendants, V. W. Winchell and F. M. Hathaway, had sold their business to a third party at or about the time of the cancellation of their contract with the plaintiff in the above entitled cause and received for such transfer a valuable consideration.

III.

That the verdict rendered against the plaintiff in the above entitled cause is contrary to and against the weight of evidence introduced upon the trial of the above entitled cause.

IV.

Plaintiff further petitions the court for an order modifying the judgment entered in the above entitled cause on the . . day of September, 1916, by off-setting against the sum of \$16,077.50 therein awarded to the defendants in lieu of the machines sought to be replevied in the above entitled action the sum of \$12,676.38, being the amount of money paid by the plaintiff to The First National Bank of Eugene, Oregon, for the benefit of and in payment and discharge of the three notes of the defendants, V. W. Winchell and F. M. Hathaway, given to the First National Bank of Eugene, Oregon, as payee, each of which said notes were secured by a chattel mortgage upon the automobiles sought to be replevied in the above entitled action, which facts appear from the undisputed evidence introduced upon the trial of the above entitled cause, and for grounds of such petition alleges that the plaintiff was compelled to and did pay the said notes of the defendants, V. W. Winchell and F. M. Hathaway, the first note being in the sum of \$2800 bearing date April 22nd, 1916; the second note being in the sum of \$2800 bearing date of May 1st, 1916, and the third note being in the sum of \$8400 bearing date May 24th, 1916, each of which notes was secured by a chattel mortgage upon the property sought to be replevied in the above entitled action, in order to free the property involved in the above entitled cause from the liens of said mortgages prior to the institution of its action for the replevin of said automobiles.

V.

Plaintiff further petitions for an order of this court modifying the judgment heretofore entered in the above entitled cause on the . . . day of September, 1916, by striking therefrom the sum of \$6000 allowed to the defendants as damages on account of the alleged erroneous action of the plaintiff in taking possession of the automobiles involved in the above entitled controversy upon the grounds and for the reason that such is not a proper item of damage, because, it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above entitled action, and the defendants are, therefore, not entitled to any damages arising from the action of the plaintiff in asserting its rights to the possession of the automobiles in controversy and its termination of its contract with the defendants, V. W. Winchell and F. M. Hathaway, and that no evidence was issued upon the trial of the above entitled cause upon which any claim or judgment for damages in the sum of \$6000 could properly be based, and that such allowance of \$6000 for damages, or any other sum in excess of \$2414.75 is in contravention of the instructions of the court directing the jury that they should not allow the value of the machines in controversy and at the same time allow any claim for loss of profits arising from an inability to sell said automobiles, and upon the further grounds that it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the business

of the defendants, V. W. Winchell and F. M. Hathaway, had been sold to a third party at or about the time of the cancellation of the said defendant's contract with the plaintiff in the above entitled action, and said defendants received therefor a valuable consideration.

PLATT & PLATT and
E. L. McDOUGAL,
Attorneys for Plaintiff.

Filed 8th day of November, 1916.

G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on Tuesday the 2nd day of January, 1917, the same being the 49th judicial day of the regular November term of said court, present: the Honorable R. S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER DENYING MOTION FOR NEW TRIAL.

This cause was heard upon motion of the plaintiff for new trial herein, and for an order modifying the judgment heretofore entered in this cause, and was argued by Mr. Hugh Montgomery of counsel for plaintiff, and by Chas. H. Hardy of counsel for said defendants, on consideration whereof

IT IS ORDERED AND ADJUDGED that each of said motions be and the same is hereby denied, and on motion of said plaintiff

IT IS FURTHER ORDERED that said plaintiff be and it is hereby allowed ten days from this date within which to submit a Bill of Exceptions, herein.

Filed January 2nd, 1917.

G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 10th day of February, 1917, there was duly filed in said court a Petition for Writ of Error, in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Ford Motor Company, a corporation,
Plaintiff,

—vs—

E. A. Farrington and L. A. Houck,
co-partners doing business under the
name and style of Pacific Transfer
Company, J. Daniels, H. Sandgathe,
doing business as Springfield Garage;
V. W. Winchell and F. M. Hathaway,
co-partners, doing business under the
name and style of Eugene Ford Auto
Company, and A. Wilhelm and John
Doe Wilhelm, co-partners, doing busi-
ness under the firm name and style of
A. Wilhelm & Son, Defendants.

PETITION FOR WRIT OF ERROR.

Ford Motor Company, a corporation, plaintiff in the above entitled cause, conceiving itself aggrieved by the final order and judgment of this court made and entered against it and in favor of the defendants on the 11th day of September, 1916, and rulings and instructions in said cause made as set forth in its Assignment of Errors herein filed, petitions said court for an order allowing said plaintiff to prosecute a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herewith under and in accordance with the rules of the United States Circuit Court of Appeals in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said Writ of Error, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals, and relative thereto plaintiff respectfully shows:

That by reason of the premises plaintiff alleges manifest error has happened to the great damage of the Ford Motor Company, a corporation, plaintiff herein.

That plaintiff has filed herewith its Assignment of Errors upon which it relies and will urge in the said appellate court;

Wherefore, plaintiff prays that a Writ of Error may issue out of the said United States Circuit Court of Appeals for the Ninth Circuit, to this court, for the correc-

tion of the errors so complained of, and that transcript of the records, proceedings, papers and all things concerning the same upon which said judgment was made, duly authenticated may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgment be reversed and that plaintiff recover judgment as demanded in its complaint.

PLATT & PLATT,
Attorneys for Plaintiff.

G. H. MARSH, Clerk.

Filed February 10th, 1917.

AND AFTERWARDS, to-wit, on the 10th day of February, 1917, present: The Honorable R. S. Bean, the United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

**IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.**

Ford Motor Company, a corporation,
Plaintiff,

—vs—

E. A. Farrington and L. A. Houck,
co-partners, doing business under the
name and style of Pacific Transfer
Company; J. Daniels, H. Sandgathe,
doing business as Springfield Garage;
V. W. Winchell and F. M. Hathaway,
co-partners doing business under the
name and style of Eugene Ford Auto
Company, and A. Wilhelm and John
Doe Wilhelm, co-partners doing busi-
ness under the firm name and style of
A. Wilhelm & Son, Defendants.

**ORDER ALLOWING WRIT OF ERROR,
STAYING PROCEEDINGS AND FIX-
ING THE AMOUNT OF BOND.**

This 10th day of February, 1917, came the plaintiff, above named, Ford Motor Company, appearing by Messrs. Platt & Platt, its attorneys of record and filed herein and presented to the court its petition praying for the allowance of a Writ of Error from the decision and judgment of this court, made and entered herein on the 11th day of September, 1916, in favor of V. W. Winchell and F. M. Hathaway, the defendants above named and against said plaintiff, and the rulings and instructions made upon the trial of the above entitled cause out of the United States Circuit Court of Appeals in and for the Ninth Circuit, to this court, together with its Assignment of Errors intended to be urged by it within due time, and also praying that a transcript of the record and proceedings and papers upon which the said judgment herein was rendered, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which plaintiff shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises,

NOW THEREFORE, on consideration thereof, this court does allow said Writ of Error upon said plain-

tiff filing with the Clerk of this court a good and sufficient Bond in the sum of Thirty Thousand (\$30,000) Dollars; to the effect that if the said plaintiff, Ford Motor Company, shall prosecute the said Writ of Error to effect and answer all damages and costs if plaintiff fails to make its complaint good, then said bond to be void, otherwise to remain in full force and virtue, the said bond to be approved by the court, and it is ordered that all further proceedings in this court be, and the same are hereby suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals, and that said Bond shall operate as a Supersedeas Bond.

R. S. BEAN, Judge.

Dated this 10th day of February, 1917.

Filed February 10th, 1917.

G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 10th day of February, 1917, there was duly filed in said court a Supersedeas Bond, in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Ford Motor Company, a corporation,

Plaintiff,

—vs—

V. W. Winchell and F. M. Hathaway,
et al.

Defendants.

BOND ON WRIT OF ERROR
and
SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, the FORD MOTOR COMPANY, a corporation, principal, and AMERICAN SURETY COMPANY OF NEW YORK, a corporation, surety, are held and firmly bound unto V. W. WINCHELL and F. M. HATHAWAY, the above named defendants, in the sum of THIRTY THOUSAND DOLLARS (\$30,000.00), to be paid to the said V. W. Winchell and F. M. Hathaway, their executors and assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors or assigns, firmly by these presents.

Sealed with our seals and dated this 10th day of February, 1917.

WHEREAS, the above-named Ford Motor Company, a corporation, is prosecuting a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above entitled cause by the District Court of the United States for the District of Oregon, entered on the 11th day of September, 1916.

NOW, the consideration of this obligation is such that if the above named Ford Motor Company, a corporation, shall prosecute said Writ of Error to effect, and answer all costs and damages if it shall fail to make

good its complaint, then this obligation to be void; otherwise to remain in full force and effect.

FORD MOTOR COMPANY,

By E. L. McDougal, Attorney.

AMERICAN SURETY CO. OF NEW YORK.

By W. J. Lyons, Resident Vice President.

(Seal) Attest: W. A. King, Resident Asst. Sec.

W. J. Lyons, Agent.

Examined and approved this 10th day of February,
1917. R. S. BEAN, Judge.

Filed February 10th, 1917.

G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 10th day of February, 1917, there was duly filed in said court an Assignment of Errors, in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Ford Motor Company, a corporation,
Plaintiff,

—vs—

V. W. Winchell and F. M. Hathaway,
et al., Defendants.

ASSIGNMENT OF ERRORS

COMES NOW the plaintiff above named, appearing by Messrs. Platt & Platt, its attorneys of record, and

says that the judgment and final order of this court made and entered in the above entitled cause on the 11th day of September, 1916, in favor of the defendants, V. W. Winchell and F. M. Hathaway, defendants above named and against said plaintiff, is erroneous and against the just rights of said plaintiff, and files herein, together with its petition for a writ of error from said judgment and order, the following assignment of errors, which it avers occurred upon the trial of said cause:

I.

The above entitled court erred in instructing the jury that the plaintiff did not make a sufficient payment or tender to the defendants of the amount of money which the defendants had advanced upon the automobiles in controversy, and in further instructing the jury that on account of the insufficiency of such payment or tender, the plaintiff was not entitled to the possession of the cars in controversy, and in disregarding plaintiff's exception to the action of the court in so instructing the jury, which instruction was as follows:

"The plaintiff company, upon the cancellation of this contract was entitled to a return of the cars which the defendants had on hand at the time, upon the payment or repayment to them of the amount of money which they had advanced or paid for the cars, which is admitted by the parties to this case to be \$16,077.50, so that the plaintiff would have been entitled to the possession of these cars if it

had paid to the defendants the \$16,077.50, but the evidence shows that it did not make such payment nor did it tender to the defendants this amount or any other amount on these cars, and therefore it was not entitled to the possession of the cars at the time this action was brought, and inasmuch as it was not entitled to the possession the action was wrongfully brought and the defendants are entitled to a return of the cars, or their value in case a return cannot be had, so that in any event it will be your duty, under the law, to find a verdict in favor of the defendants to the effect that they are entitled to a return of these cars, or their value in case a return cannot be had."

II.

The above entitled court erred in refusing to instruct the jury that payment to the defendants of the advancements made by the defendants on the automobiles in controversy by the plaintiff was not necessary before instituting the above entitled action if the defendants informed the plaintiff, or led the plaintiff to believe that they would not accept such payment, which instruction was requested by the plaintiff in writing, and was designated Plaintiff's Requested Instruction No. "IV," which instruction was as follows:

"I instruct you that payment to defendants of advancements on said automobiles by defendants before taking possession of the

same, by the plaintiff, was not necessary if the defendants informed plaintiff or led plaintiff to believe, they would not accept said payment."

III.

The above entitled court erred in instructing the jury that it was for the jury to determine whether or not the taking of the automobiles in question from the possession of the defendants destroyed or injured the business of the defendants, and to what extent such business was so destroyed or injured, which instruction was as follows:

"Now the defendants claim and allege that their business was entirely destroyed. You have heard the testimony upon that question and it is for you to say whether or not the taking of those thirty-seven cars from their possession and the circumstances under which they were taken destroyed or injured their business, and if so, to what extent if you can arrive at that conclusion. They allege in their answer that their business was paying an income of \$300.00 a month and that they were deprived of that income by reason of the wrongful acts of the plaintiff company. Now, in estimating the damages you should keep in mind the amount that you allow as the value of these cars. The taking of the cars away from the defendants of course deprived them of the right to sell them and of any profits that they might have derived from the sales. That was one thing that of

course was the result of this taking of the cars by the plaintiff company. Now, the profits on the sales would of course be a matter to be considered by the jury in arriving at your verdict in this case, but if you allow that on the value of the cars, that is if you find that the value of the cars is the amount that is claimed by the defendants, which is the wholesale price with the 15% added, or the profits that the defendants would have made if they had sold the cars, then you should not allow that same profit in estimating the damages. In other words, you should be careful not to allow the same item twice in the item of damages. Now, the burden of proof is upon the defendants in this case to show by evidence which satisfies the jury, so that you can arrive at an intelligent and satisfactory verdict as to the amount they were damaged, if any, by this act of the plaintiff. It should not be based upon speculation nor conjecture but upon the facts and circumstances of the case as disclosed by the testimony."

IV.

The above entitled court erred in refusing to instruct the jury that the burden rested upon the defendants to prove by a preponderance of the evidence that they had been specially damaged by the action of the plaintiff in taking possession of the automobiles in controversy, which instruction was requested in writing by the plain-

tiff, and was known as Plaintiff's Requested Instruction No. "XI," which requested instruction was as follows:

"The burden is upon the defendants to prove by a preponderance of the evidence, that the automobiles here in question are of the value they allege, namely \$18,555.25, and that they have been further specially damaged in the sum of \$25,000.00, and unless defendants do convince you by a preponderance of the evidence, to this effect, then they have failed and your verdict should be against them."

V.

The above entitled court erred in refusing to instruct the jury that the defendants had failed to prove damages in the case, and that the only question before the jury for decision was to determine who were the owners and entitled to the possession of the automobiles in controversy, which instruction was requested by the plaintiff in writing, and was known as Plaintiff's Requested Instruction "B," which requested instruction was as follows:

"I instruct you that the defendants have failed to prove damages in this case and that the only question for you to decide is who are the owners and entitled to the possession of the automobiles in question and their value."

VI.

The above entitled court erred in sustaining the defendants' motion to take from the consideration of the

jury all of the evidence offered by the plaintiff as to the payment to The First National Bank, of Eugene, Oregon, of the amount of certain liens imposed upon the automobiles in controversy by the defendants in favor of the said First National Bank, of Eugene, Oregon, and in refusing to instruct the jury that the plaintiff was entitled to an offset against any claim of the defendants in the amount of money paid to the said First National Bank of Eugene, Oregon, to remove the liens imposed upon the automobiles in controversy by the defendants in the above entitled action.

VII.

The above entitled court erred in ruling upon the trial of the case that the evidence showed that the plaintiff had failed to return the advances made upon the automobiles in question, or to tender such advances to the defendants, which ruling was as follows:

“COURT: As I interpret this contract, for the purpose of this case it is immaterial whether these cars were held by the defendants under consignment or as a sale. In any event, the contract provided that the Ford Motor Company might recover possession of them in case the contract was cancelled upon returning the advances, but before it could recover, it must return the advances or at least tender them, and the evidence in this case shows it did neither—it did not return the advances nor did it tender the money. All the evidence is Mr. Goden said

he had the money in the bank but never offered to pay it—never gave the defendants any opportunity to accept it, but proceeded to institute this action without complying with their contract, and therefore I think as far as that feature of the case is concerned the defendants are entitled to a ruling instructing the jury to return a verdict in their favor for possession of this property.”

VIII.

The above entitled court erred in directing a verdict in favor of the defendants and against the plaintiff to the effect that the defendants were entitled to a return of the automobiles in controversy, and in instructing the jury that the plaintiff did not tender to the defendants the amount of the advances upon said automobiles, or any other amount, and was, therefore, not entitled to possession of the cars at the time the action was brought, and in further instructing the jury that under the law they should find a verdict in favor of the defendants to the effect that such defendants were entitled to a return of the cars, or their value, in case such a return could not be had, which instruction was as follows:

“The plaintiff company, upon the cancellation of this contract was entitled to a return of the cars which the defendants had on hand at the time, upon the payment or repayment to them of the amount of money which they had advanced or paid for the cars, which is admitted

by the parties to this case to be \$16,077.50, so that the plaintiff would have been entitled to the possession of these cars if it had paid to the defendants the \$16,077.50, but the evidence shows that it did not make such payment nor did it tender to the defendants this amount or any other amount on these cars, and therefore, it was not entitled to the possession of the cars at the time this action was brought, and inasmuch as it was not entitled to the possession the action was wrongfully brought, and the defendants are entitled to a return of the cars, or their value in case a return cannot be had, so that in any event it will be your duty, under the law, to find a verdict in favor of the defendants to the effect that they are entitled to a return of these cars, or their value in case a return cannot be had."

IX.

The above entitled court erred in sustaining defendants' motion for a directed verdict on the ground that the plaintiff had made no demand for the possession of the automobiles in controversy prior to the institution of this action, and in failing to instruct the jury that such a demand was unnecessary in the above entitled action, which requested instruction was as follows:

"I instruct you that the plaintiff, Ford Motor Company, under its contract with defendants, had the right to cancel, by registered letter

the Limited Agency Contract with defendants at any time and without cause, and retake possession of any unsold automobiles in the possession of any unsold automobiles in the possession of the defendants, at the same time returning defendants advancements on said automobiles.”

X.

The above entitled court erred in refusing to instruct the jury that the contract between the plaintiff and defendants was a Consignment Contract, which instruction was requested in writing, and designated Plaintiff’s Requested Instruction No. “VI,” which instruction is as follows:

“I instruct you that the Limited Agency Contract between plaintiff and defendants, Ford Auto Company, is a Consignment Contract and that by virtue of said contract plaintiff upon returning or offering to return the advancements made on the consigned automobiles in question, was entitled to the immediate possession of said automobiles.”

XI.

The above entitled court erred in instructing the jury that 85% of the list price was all that defendants were expected or required to pay under the contract, which instruction was as follows:

“It also appears in testimony that at that time the defendants had in their possession some 37 cars which they had previously ordered from the plaintiff upon which they had paid 85% of the list price, or all that they were expected or required to pay under the contract.”

For the reason that it appears from the face of the contract introduced in evidence upon the trial of the above entitled cause, and which contract was admitted by all parties, that the 85% of the list price was only a portion of the consideration which the plaintiff and purchasers of its cars was to receive from the defendants in this case, and for the further reason that it was provided under and by virtue of the terms of said contract that upon the cancellation thereof the plaintiff might exercise its option to retake possession of the cars in controversy upon returning the 85% advanced, and in event of its failure to exercise such option, the defendants would make every reasonable effort to sell such cars within three months after cancellation of the contract, and in event of their inability to accomplish such sale said defendants would be entitled to purchase said automobiles by the payment of ten per cent additional of the list price, and would have a lien upon the automobiles for the 85 per cent advanced.

XII.

The above entitled court erred in over-ruling and not sustaining plaintiff's motion for a modification of the judgment entered in the above entitled action by which

motion the plaintiff requested the court to offset against the judgment entered in the above entitled cause the sum of \$12,676.38, being the amount of money paid by the plaintiff to the First National Bank, of Eugene, Oregon, for the benefit of defendants, in payment and discharge of the liens imposed by the defendant upon the automobiles in controversy, and to further modify said judgment by eliminating therefrom the \$6000.00 allowed to the defendants as damages on account of the alleged erroneous action of the plaintiff in taking possession of the automobiles, because no evidence was introduced upon the trial of said cause showing that the defendants had been specially damaged in the sum of \$6000.000, or any sum, and for the further reason that the plaintiff had a legal right to, and did, terminate its contract with the defendants, and that the undisputed evidence established that the defendants V. W. Winchell and F. M. Hathaway had sold their business to a third party prior to the cancellation of the contract with the Plaintiff.

WHEREFORE the said plaintiff and plaintiff in error prays that the judgment of said court be reversed, and such directions be given that full force and efficacy may inure to the plaintiff by reason of the cause of action set up in its amended complaint filed in said cause, and that judgment be entered in favor of the plaintiff in accordance with the demand of its amended complaint filed in said cause.

PLATT & PLATT,

Attorneys for Plaintiff.

Filed February 10th, 1917. G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 10th day of February, 1917, there was duly filed in said Court a Bill of Exceptions, in words and figures as follows:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

Ford Motor Company, a corporation,
Plaintiff,

vs.

E. A. Farrington, V. W. Winchell, and
F. M. Hathaway, et al., Defendants.

BILL OF EXCEPTIONS

BE IT REMEMBERED, that on the 5th day of September, 1916, at the regular term of the above-entitled Court, held at the City of Portland, State of Oregon, the above-entitled cause came on for trial before the Honorable Robert S. Bean, Judge presiding, when the following proceedings were had, to-wit:

Frederick B. Norman, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

(Questions by Mr. McDougal)

Q. Mr. Norman, what was your position with the Ford Motor Company on or about the months of May and June, 1916?

A. Local manager for this territory.

Q. Your headquarters at what town?

A. Portland.

Q. As local manager, will you state whether or not the territory of Lane County, Oregon, was embraced in this district?

A. It was.

Q. Are you acquainted with Mr. Winchell and Mr. Hathaway, the defendants in this case?

A. I am.

Q. Will you state in what capacity, if any, they represented the Ford Motor Company at Eugene?

A. Agents.

Q. Here is a contract. Will you identify it and see if it is the signature of yourself?

A. Yes, sir.

Q. And Mr. Winchell and Mr. Hathaway?

Contract offered in evidence, received without objection and marked PLAINTIFF'S EXHIBIT 1.

PLAINTIFF'S EXHIBIT 1.

1915—LIMITED AGENCY CONTRACT—1916

THIS AGREEMENT, made at Highland Park, Michigan, this 10th day of September, 1915, by and between the Ford Motor Company, a Michigan corporation of Highland Park, Michigan, hereinafter known as the first party, and Eugene Ford Auto Co., of Eu-

gene, in the State of Oregon, hereinafter known as the second party, **WITNESSETH:**

WHEREAS the first party is the manufacturer of a line of automobiles known as Ford automobiles and also of automobile parts and accessories, and

WHEREAS the second party has applied to the first party to be the agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and first party is willing to appoint second party, with certain limited authority and upon the following terms and conditions only:

NOW, THEREFORE, this witnesseth:

APPOINTMENT AS LIMITED AGENT

(1) That first party hereby appoints second party its "Limited Agent" with certain authority as herein expressly stated only, for the purpose of negotiating sales of first party's product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

POWERS

(2) That second party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

AUTOS ON CONSIGNMENT

(3) That first party will consign its Ford automobiles to second party to be sold to users only, and

not for re-sale, upon bills of sale to be executed by the first party only, as hereinafter provided.

TERRITORY

(4) The second party shall arrange for sales of Ford automobiles only to residents of the following specified territory shown on the attached map, and to no other, namely:

The entire territory, including that of the Sub-Limited Agents, shall consist of the following, namely:

(4) All of Lane County except extreme Western portion of townships in R-10-W, R-11-W, and R-12-W; portion of Douglas County Tier, T-19-S in R-6-W to R-9-W; Tier T-20-S R-4-W to R-9-W; Tier T-21-S, R-4-W to R-9-W inclusive. Portion Lane County as follows: T-15-S R-9-W, T-16-S R-8-W, T-16-S R-9-W, Tier of (288 cars) T-15-S R-1-W and R-1-E to R-8-E; Tier T-16-S, R-1-W to R-3-W inclusive. Tier T-16-S R-1-E to R-8-E inclusive. Tier T-17-S R-1-W to R-9-W inclusive. Tier T-16-S R-1-E to R-8-E inclusive. Tier T-17-S R-1-W to R-9-W inclusive. Tier T-17-S R-1-E to R-8-E inclusive. Tier T-18-S R-5-W to R-9-W inclusive. Tier (170 cars) T-17-S R-1-E to R-8-E inclusive. Tier T-18-S R-5-W to R-9-W inclusive. Tier T-18-S R-1-E to R-7-E inclusive. Tier T-19-S R-1-E to R-7-E inclusive. T-19-S R-7-W north half of T-18-S R-1 and 2 W. Portion of Northern part of Douglas County, being townships lying north of Tier T-22-S within Ranges 4-W to 9-W, southern

part of Lane County lying south of Tier T-19-S; also Tier T-19-S in R-1-W to R-6-W inclusive. The southern half of T-18-S R-1-W and T-18-S in R-2-W, Tier T-15-S and Tier T-16-S in R-4-W to R-7-W inclusive, also the town of Springfield. (118 cars)

The retail territory, that is, the territory wherein second party arranges direct sales (and in which no Sub-Limited Agents are appointed) consists of the following, namely:.....
.....
.....
.....

The remainder of said entire territory shall be known as wholesale territory wherein shall be appointed Sub-Limited Agents as hereinafter provided, namely:.....
.....
.....

RESIDENCE DEFINED

In this connection, it shall be construed that a purchaser resides at either (a) his legal domicile; (b) the place where he sojourns for not less than three consecutive months; (c) his permanent place of business or occupation; or (d) either home where more than one is maintained. The decision of the first party in all violations of this sub-division shall be final and conclusive, with no recourse or appeal on the part of the second party.

DAMAGES FOR BREACH TERRITORIAL RESTRICTIONS

(5) The sales of Ford automobiles to residents outside of second party's own territory is a serious trespass upon the rights and earnings of other Limited Agents and Sub-Limited Agents, and tends to destroy the organization and business of the first party, and therefore, it is agreed that the territorial restrictions and limits set forth herein are of vital consequence to the first party and its business, as well as to the business of all other Limited Agents and Sub-Limited Agents, and therefore, for any and each violation of the same by the second party, second party hereby agrees to pay to the first party the sum of Two hundred fifty dollars (\$250.00) as and for liquidated damages. Said sum or sums may be deducted from any deposit he may have with the first party, or from any sums which first party may owe, for business done, to second party. First party may also cancel this contract for any such violation.

PRICES

(6) Second party shall arrange for sales of Ford automobiles to users at the first party's full advertised list prices only, current at date of sale, plus Fifty-three and 25/100 Dollars (\$53.25) for each automobile for freight charges and delivery expenses, plus the amount, if any, of any present or future United States tax or excise upon or in respect of each automobile or sale thereof. Wherever the words "List price" are used

herein they mean the latest retail selling price established or fixed by the first party.

SALES OF AUTOS FOR CASH ONLY

(7) Second party shall arrange all sales of Ford automobiles for cash only; but if second party should accept anything but cash payment on Ford automobiles, it must be upon his own responsibility and for his own account solely, and he must remit cash only to first party.

REBATES FORBIDDEN

(8) Second party will not render any services or supply any goods either gratis or at reduced prices, nor do or permit any act whatsoever either directly or indirectly, or through other parties, that would directly or indirectly have the effect of reducing the said current advertised list prices of Ford automobiles, plus freight and delivery charges, and said United States tax or excise, if any, and in the event of a breach or violation hereof, second party shall pay to the first party the sum of Two hundred fifty dollars (\$250.00) for every such breach or violation as and for liquidated damages arising to the first party and its business by reason of such breach or violation, or the same sum may be deducted from any moneys in first party's hands belonging to second party or which first party may owe, for business done, to second party. First party may also cancel this contract for any such violation.

CHANGES IN PRICES

(9) The first party may change the list prices of any of its products at any time it may choose, and second party shall conform to such changes immediately upon receiving notice thereof, and in case of increase or reduction in such list prices, first party shall not be bound to make any allowance to second party in cases of automobiles shipped before such changes take effect, and the second party's commission on automobiles as yet unsold by him shall be the difference between the eighty-five per cent (85%) advanced by him on such automobiles and the new selling price; provided, that in case of a reduction in price the first party will allow to second party a proportionate rebate on his advances made on such automobiles as still remain unsold in his possession at the date of such reduction as to automobiles shipped to the second party within thirty days immediately before such date, but none as to those shipped prior to such thirty day period.

ADVANCES

(10) Second party shall advance in cash to first party eighty-five per cent (85%) of the full advertised list price at the time of the consignment of its automobiles by first party to second party.

FREIGHT

(11) Second party shall pay the freight from Detroit or branch factory and advance freight, if any, as the case may be, to second party's place of business.

TITLE OF AUTOS

(12) First party shall retain all and complete title to each automobile until actual bill of sale, signed and executed by first party, has been delivered to the vendee, who shall be only a user; that is, one who has purchased for immediate use and not for re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and said United States tax or excise, if any, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever.

LIEN FOR ADVANCES—INSURANCE

(13) Second party shall have a lien on each Ford automobile for the eighty-five per cent (85%) advanced by him on the same and for freight paid by him on the same, and he shall keep and maintain insurance so as to protect himself against loss.

RETAIL BUYERS' ORDERS

(14) Second party shall take from each proposed purchaser of a Ford automobile and immediately forward to first party, a written order duly signed by him, upon the regular blank "Retail Buyer's Order," furnished by first party, without alterations or changes except the filling in of blanks, and second party will make

no arrangement for the sale of a Ford automobile without taking such written signed order.

DEPOSITS ON AUTOS

(15) All deposits of money, checks, etc., on Ford automobiles made by proposed buyers shall be remitted immediately when received with the Retail Buyer's Order to the first party, who shall be the custodian thereof, and first party will make proper disposition thereof when the transaction is closed according to the rights of all parties.

COMPANY MAY REJECT ORDERS

(16) The dealings of the second party with a proposed purchaser of an automobile or the taking of a signed order blank as herein required or a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order, but first party may wholly reject the same for any reason satisfactory to first party, and the proposed purchaser shall acquire no rights whatever in the automobile until delivery of the duly executed bill of sale as herein provided.

WEEKLY REPORTS OF BUSINESS

(17) The second party shall report each week to first party all Ford automobiles contracted for by him with purchasers under this agreement, including all sales by Sub-Limited Agents and their purchasers, giving

motor number and description of each automobile sold or contracted for, the date of sale and full name and address of each purchaser.

WARRANTY

(18) Second party shall have no authority to make any warranty whatsoever of Ford automobiles, but the purchaser shall be referred to the provisions of the Retail Buyer's Order and Bill of Sale in that behalf. Second party shall have no authority to make any warranty representing first party, of any parts or accessories. The current printed literature issued by the first party will contain the only warranties of parts or accessories made by first party.

REPRESENTATIONS

(19) The second party shall make no representations as to Ford automobiles or parts or accessories, except the same as are set forth in the printed literature issued by the first party. If second party violates these provisions he may be personally liable, but shall not in any wise bind the first party.

CLAIMS AGAINST CARRIERS

(20) In case of damage to automobiles by carriers in transit to second party, collection from the carrier shall be made in the name of the first party as the owner of such automobiles—but as between the parties hereto, the second party shall be entitled to eighty-five per cent

(85%) of the amounts realized, less the like proportion of expenses of collection, or the first party may, at its option, assign to second party all its claims in such matter, whereupon second party shall present and prosecute his own claim without any liability of the first party, and it is stipulated that first party shall not be liable to the second party for any injury or damage to the automobile after it is once delivered to the carrier or for any return of the advances thereon.

KEEP PLACE OF BUSINESS

(21) That second party will maintain on his own account and at his own expense, a place of business and properly equipped repair shop prominently located in Eugene for the purpose of conducting such Limited Agency business, and shall employ competent and efficient salesmen, and first party shall not in any wise be responsible for the charges connected with such place of business, nor shall second party have any authority to render first party responsible for the rent, taxes, wages, or other charges or liabilities of any nature whatsoever arising out of such business or in connection with such place of business.

THEFT OR DAMAGE TO AUTOS. WILL SELL ALL AUTOS. CLAIMS BY THIRD PERSONS

(22) Second party shall safely keep and he hereby agrees to save first party harmless against them for dam-

age of any kind to said Ford automobiles while in his possession under consignment, and in consideration of his being granted this agency, he expressly agrees that he will bear all damages or injury arising from theft, accident, injury or other cause to said automobiles so consigned to him while in his possession, or while in transit from first party to second party. Inasmuch as first party bases its output and expenditures upon the orders given by its Limited and Sub-Limited Agents, therefore, and in consideration of this contract the second party hereby agrees to arrange sales under the terms of this contract and by and in accordance with the methods herein provided, of all the automobiles consigned and delivered to him pursuant to his orders for the same, and first party shall not be liable to return to second party his advances on same. The second party also agrees to save first party harmless against any and all claims made against first party by any person or persons not parties hereto for damages arising out of the conduct of second party's said business or Limited Agency whether from accident or injury or collision or loading or unloading or driving or theft or fire or from any cause of any and every nature whatsoever.

TAXES

(23) The second party shall, as a part of the expenses of his business, pay any taxes that may be levied upon or against or on account of such business or his stock, or of any of such automobiles as may be in his position or in transit on bill of lading, or otherwise, for delivery to him.

SIGNS, ADVERTISEMENTS

(24) The second party agrees to conspicuously display signs on and in his building and windows, designating that he is the "Limited Agent for Ford cars" for the territory specified herein and he shall advertise the first party's product effectively in the local papers and give his immediate and careful attention to all inquiries, and give good representation to all interests of first party in the territory aforesaid. Second party agrees not to advertise or trade in the first party's product in such a way as to be an annoyance or injurious to first party or any of its duly appointed Limited Agents or Sub-Limited Agents, and that he will not repeat any such advertisements or publish any form of advertising containing matter to which the first party has objected, and that he will follow as closely as possible the advertising copy provided from time to time by the first party. When agency of second party is cancelled or terminated he agrees to remove all such signs and cease such advertising.

REPAIRS, NUMBER PLATES, ETC.

(25) Second party agrees that he will make repairs on all Ford automobiles in his territory, or coming into his territory, whether sold through him or not, and to perform this work promptly and in workmanlike manner, and that he will not remove or alter the first party's patent plate, motor number, or other numbers or marks affixed to any Ford automobile, or suffer the same to

be done, and that he will not materially change any automobile consigned to him by the first party.

DEMONSTRATOR

(26) Second party agrees to purchase from first party for himself and keep in use at all times at least one Ford automobile of the current year's model, for the sole purpose of demonstration and exhibition to intending purchasers and to maintain same in proper running condition and good, clean order and repair at all times. If he sells said automobile before the same has been in actual use three months, second party agrees that he will sell the same at the full advertised list price only, and within his own territory only, as provided in sub-divisions four, six and eight hereof. For any breach of this provision the second party shall pay to first party Two hundred fifty dollars (\$250.00) as reasonable liquidated damages. The only warranty of such demonstrating or service cars by the first party is agreed to be the same as that given by first party on automobiles sold to the general public and which is printed on the Retail Buyer's Order.

PATENTS

(27) First party owns, and the Ford automobiles are manufactured under, and embody the following letters patent of the United States or some of them, namely:

United States letters patent No. 747,909 issued December 22, 1903.

United States letters patent No. 773,934 issued November 1, 1904.

United States letters patent No. 787,908 issued April 25, 1905.

United States letters patent No. 847,405 issued March 19, 1907.

United States letters patent No. 879,757 issued February 18, 1908.

United States letters patent No. 1,005,186 issued October 10, 1911.

United States letters patent No. 1,012,620 issued December 26, 1911.

United States letters patent No. 1,044,038 issued November 12, 1912.

United States letters patent No. 1,066,729 issued July 8, 1913.

United States letters patent No. 1,073,569 issued September 16, 1913.

United States letters patent No. 1,075,557 issued October 14, 1913.

United States letters patent No. 1,078,042 issued November 11, 1913.

United States letters patent No. 1,098,361 issued May 26, 1914.

and of applications for letters patent now pending and undetermined. First party further owns, and Ford automobiles, parts and accessories are manufactured and sold under and embody the exclusive right to the use of

the name "FORD" acquired by and through United States copyright and trademark registration numbers 74,530, issued July 20th, 1909 (script word "FORD"), and 98,655, issued July 28th, 1914 (winged pyramid design), together with the rights acquired and established thereto by and through fair trade and trade user. The validity of each of said patents and of the said copyright, registration and trade user rights, and of the claims of the first party under said applications is hereby expressly admitted; and it is agreed that the sale and use of said automobiles as delivered to the second party are restricted according to the terms of this agreement of agency, and that no license to handle or use said automobiles under such patents and applications, except strictly in accordance with the terms and conditions of this contract, is given; that second party's right to handle and deliver said automobiles embodying said patents and inventions, is restricted and limited by this contract in its terms, and that no person shall acquire the right to use said automobiles or to own the same if there be any violation of the territorial or price restrictions set forth herein; and any such violation shall constitute an infringement of each and every of said patents, applications and inventions.

COMMISSIONS

(28) As second party's commission for making such sales of Ford automobiles, first party will, after payment by the purchaser, allow to second party (except in the cases specified in sub-division nine hereof)

fifteen per cent (15%) of such full advertised list price, and will allow to second party such freight and delivery charges, and United States tax or excise, if any, as aforesaid.

ADDITIONAL COMMISSIONS

(29) First party agrees to allow and pay to second party the following additional commissions on the net amount of business he shall do hereunder during the term of this agreement, upon Ford automobiles, but not on Ford parts, repairs or accessories, namely: No added commissions whatever when his said business shall total less than \$5,000.00, but when the second party shall have done such business (not including freight charges and not including his fifteen per cent (15%) commission) to the amount of \$5,000.00, his right to additional commissions shall begin, and he shall be entitled to such added commissions as follows: On all such business totaling less than \$10,000.00, one per cent (1%); if \$10,000.00 and less than \$20,000.00, two per cent (2%) on all such business; if \$20,000.00 and less than \$35,000.00, three per cent (3%) on all such business; if \$35,000.00 and less than \$50,000.00, four per cent (4%) on all such business; if \$50,000.00 or more, five per cent (5%) on all such business. That is, for illustration, if he shall have done \$7,000.00 total business as above described, his commission shall be one per cent (1%) on all of such \$7,000.00. If, for illustration, his total business as above described shall be \$34,900.00, his commission shall be three per cent (3%) on all of such \$34,900.00. If \$49,-

900.00, then four per cent (4%) upon all of such \$49,900.00; if it shall total \$50,000.00, then five per cent (5%) on all of such \$50,000.00, and likewise five per cent (5%) upon all such business over \$50,000.00.

If any payments shall have been made to second party during the year on the one per cent (1%) basis or any lower basis than he shall finally be entitled to, such payments shall be credited on the final amount owing him and shall be deducted when he becomes entitled to and shall receive the higher percentages.

PAYMENTS TO SUB-LIMITED AGENTS SECURED

(30) It is agreed that such added commissions shall not be paid to second party until the second party shall have furnished satisfactory evidence to first party that all commissions and added commissions due or owing or which may later become due or owing the Sub-Limited Agents under the second party have been fully paid, or until satisfactory arrangements are made with the first party to insure Sub-Limited Agents being paid the commissions and added commissions which may be due or become due to them under their respective contracts.

COMPANY MAY SELL DIRECT

(31) First party hereby expressly reserves to itself the right to make direct sales to customers in the territory above described, and in such case will pay one (and only one) commission of five per cent (5%) of the list price of

the automobile or automobiles so sold, after it shall have received the full purchase price in cash, to the second party, or if there shall be a Sub-Limited Agent in that special territory and locality where such sale is made, then such five per cent (5%) shall be paid to such Sub-Limited Agent. This provision shall not apply to sales of parts or accessories, which are otherwise provided for herein, nor shall it apply to sales to or through Sub-Limited Agents, but only to those made by first party directly to purchasers domiciled or residing in said territory within the meaning of Sec. 4 of this agreement. First party shall not pay any commission to second party or his Sub-Limited Agents on any sales to residents outside second party's territory, even though delivery should be made within said territory to residents of such other territory.

STOCK OF FORD PARTS

(32) Second party agrees that he will purchase from the first party on his own account and carry on hand at second party's place of business aforesaid, a stock of Ford parts that will inventory at all times during the term of this agency contract, not less than Two Thousand Dollars (\$2000.00) at the list price, and first party shall have the right to send its representative to inventory such stock of Ford parts as second party may have on hand, at any time during the term of this contract. First party may cancel this contract for any breach of this provision. Inasmuch as the reputation of Ford cars is often injured by the use therein of inferior

parts not made or furnished by the Ford Motor Company, therefore, the second party also hereby agrees that all his purchases of parts for Ford automobiles shall be made, as to all parts listed in its parts catalogue, exclusively from the first party, and that he will not use, sell or recommend to Ford owners similar parts manufactured by others.

DISCOUNT ON PARTS

(33) First party agrees to allow the second party a discount of twenty-five per cent (25%) on all parts of Ford automobiles listed in the Ford parts price lists, excepting on bodies, on which the discount shall be fifteen per cent (15%) only. These discounts are allowed in consideration of second party's agreement to carry stock as provided in sub-division thirty-two above, and in consideration of the other provisions of this contract.

First party agrees to allow second party an additional discount of ten per cent (10%) on all Ford parts sold by second party at wholesale to Sub-Limited Agents under him; said additional ten per cent (10%) to be credited by first party monthly on receipt by it of certified itemized statement of such sales and deliveries made during the previous month by the second party.

RETURN OF PARTS

(34) The second party shall have the right and privilege of returning to first party at the place of purchase at any time during the term of this contract, or

within thirty days after its cancellation or expiration, but at his own expense, for credit at the purchase price, all such new parts of first party's automobiles as he may desire, except bodies, tops, tires, lamps, generators, speedometers, windshields, and other equipment known in the trade as "accessories" provided same are in as good condition as when sold by the first party to the second party.

COMPANY MAY SELL PARTS

(35) First party reserves the right and privilege to sell and deliver or cause to be sold and delivered any parts of Ford automobiles, repairs, accessories or other goods that may be ordered from it by any person or persons within the territory covered by this agreement, without the payment of any profit or allowance or any discount or credit whatever to the second party upon such sales. It is expected and intended that second party will carry the stock of Ford parts, repairs and accessories as herein provided, and that nearly all orders for such parts, repairs and accessories will be placed with him by all persons in the above described territory.

CLAIMS

(36) It is further agreed that no claims regarding errors in shipments or billings are to be recognized by first party, unless received in writing by it from the second party within ten days after receipt of the goods by the second party.

CRATING, ETC. EXTRA

(37) The first party will be entitled to receive an extra charge for crating, packing, double decking and loading, which the second party shall stand and pay as a part of the expenses of conducting his business.

DELAYS IN SHIPMENTS

(38) The first party shall not be liable in any way for delayed shipments of any goods ordered or on account of shipments by any other than a specified route.

PAYMENTS AT HOME OR BRANCH OFFICE

(39) The second party agrees to take up all sight drafts with exchange drawn on him by the first party for automobile consignments or for shipments of parts, when shipments arrive or when sight drafts are presented, the intent hereof being that payments are to be made to the first party at its home or branch office, but if it elects to draw drafts, the same will be honored with exchange by second party.

DEPOSITS

(40) As a guarantee of the full and faithful performance by the second party of all the terms and conditions of this agreement, the second party has deposited with the first party the sum of Eight Hundred Dollars (\$800.00) in cash, and it is agreed that the first party

may, at is option, apply any part or all of said amount towards the liquidation of any past due accounts owing by second party to first party, or any other legitimate claims arising from the second party's failing to perform the obligations of this agreement, and the balance of said contract deposit, if any, shall be returned to the second party at the termination of this agreement and the fulfillment of all its requirements. In case of cancellation or termination of this contract as herein provided, such deposit balance on hand may be retained by first party as security for and until the fulfillment of all provisions hereof as to the winding up of the business of the agency and final disposition of all unsold cars as stipulated herein. Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party.

ESTIMATE OF AUTOS REQUIRED

(41) In order that first party may determine the prospective requirements of its business for the business year ending July 31, 1916, and may base its contracts for materials, etc., thereon, the second party agrees that he will require consignments of not less than 288 Ford automobiles for his said entire territory between the date hereof and July 31, 1916, to be shipped in the various months as per the following schedule, and he hereby makes requisition for such automobiles to be shipped as stated, namely:

For his wholesale and retail territory respectively, as follows:

In August, 1915, Wholesale Territory.....	22	Autos
In August, 1915, Retail Territory.....	8	Autos
In September, 1915, Wholesale Territory....	16	Autos
In September, 1915, Retail Territory.....	24	Autos
In October, 1915, Wholesale Territory.....	2	Autos
In October, 1915, Retail Territory.....	24	Autos
In November, 1915, Wholesale Territory....	0	Autos
In November, 1915, Retail Territory.....	8	Autos
In December, 1915, Wholesale Territory....	0	Autos
In December, 1915, Retail Territory.....	8	Autos
In January, 1916, Wholesale Territory.....	18	Autos
In January, 1916, Retail Territory.....	16	Autos
In February, 1916, Wholesale Territory....	0	Autos
In February, 1916, Retail Territory.....	8	Autos
In March, 1916, Wholesale Territory.....	2	Autos
In March, 1916, Retail Territory.....	38	Autos
In April, 1916, Wholesale Territory.....	24	Autos
In April, 1916, Retail Territory.....	24	Autos
In May, 1916, Wholesale Territory.....	8	Autos
In May, 1916, Retail Territory.....	16	Autos
In June, 1916, Retail Territory.....	6	Autos
In June, 1916, Wholesale Territory.....	8	Autos
In July, 1916, Wholesale Territory.....	8	Autos
In July, 1916, Retail Territory.....	0	Autos

REQUISITIONS MAY BE DECLINED

(42) First party agrees that the foregoing requisitions of the second party will receive first party's careful and good faith attention, but first party does not agree absolutely to fill them, but expressly reserves the right

to refuse them from time to time, or such parts of them as the first party deems necessary or proper, and all such requisitions are subject to delays occurring from any cause whatsoever in the manufacture and delivery of its product—no legal liability to fill such requisition being incurred under any circumstances. And the second party may cancel, upon one month's full written notice to first party, the said requisitions, or what remains unfilled thereof.

PRICE MAY BE CHANGED

(43) It is further agreed that the foregoing requisitions for consignments of Ford automobiles are given by second party and received by first party subject to the express condition that prices are subject to be changed by the first party at any time during the year and deposits are so accepted; in the event of changes, however, the second party may cancel such remaining requisitions, and may demand and receive back from the first party such deposits as may have previously been made, less any amounts for which second party may be obligated or owing either directly or indirectly to the first party.

SUB-AGENCIES

(44) Second party shall appoint a Sub-Limited Agent or establish a properly equipped branch or garage for the sale and repair of Ford automobiles in every such city or town within the above described territory as shall at any time or from time to time be designated by

first party, in order that first party shall have adequate representation therein, and so that the public shall have at hand facilities for purchasing Ford automobiles, parts, repairs, accessories and supplies, and if second party fails to secure such Sub-Limited Agents, or establish branches as herein provided, then first party may do so, or first party may take such territory entirely away from second party, or first party may sell direct its automobiles, parts, accessories, etc., in such unoccupied territory, in any of which cases the second party shall not claim or be entitled to any commissions on business so handled.

SUB-LIMITED AGENTS' COMMISSIONS SUB-LIMITED AGENTS' CONTRACTS

(45) The second party shall allow and pay the Sub-Limited Agents the regular Limited Agent's commissions on the net volume of business done, and will require each Sub-Limited Agent to execute the Sub-Limited Agent's agreement provided in blank by first party in triplicate, and shall within three days after the execution thereof transmit in triplicate said agreement, properly executed, to first party for its approval and signature, and upon being executed by the first party, one copy each shall be delivered and kept by the first party and second party hereto and said Sub-Limited Agent. No arrangement or agreement made by second party with any Sub-Limited Agents shall be in any manner binding upon the first party until it shall have been reduced in writing on such blank aforesaid and ap-

proved and signed in triplicate by first party's duly authorized executive officer and delivered as aforesaid, and second party further agrees not to enter into any private arrangement or agreement with any party or parties to act as his Sub-Limited Agent except as herein provided. All Ford automobiles sold by first party through the Sub-Limited Agents of the second party, appointed and authorized as aforesaid, shall be considered as taken by the second party as a portion of the Ford automobiles handled by him under this contract.

DEPOSITS OF SUB-LIMITED AGENTS

(46) The first party shall be custodian of all contract deposits made by the Sub-Limited Agents and of all deposits made by proposed buyers, and in the event of the termination or cancellation of this contract, second party shall have no claim whatsoever directly or indirectly against first party, for such deposit moneys, whether such deposits are made through the second party or directly by the Sub-Limited Agents or buyers themselves. When deposit moneys are transmitted to the first party by the second party, second party shall specify whose money the same is, and on what particular contract or Retail Buyer's Order such deposit is being made.

NO ASSIGNMENT

(47) The second party shall have no right to assign this contract, or any interest in the same, without the written consent of the first party.

CANCELLATION

(48) This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect.

SALE OF AUTOS ON HAND AT TIME OF
TERMINATION

(49) In case of the cancellation or expiration of this contract the first party may at its option retake possession of all such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided however, if, after reasonable effort on the part of second party to make such sale there shall remain on

hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent '(10%) additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.

PERFORMANCE OF SUB-LIMITED AGENCY CONTRACTS

(50) In case of cancellation of this contract first party will carry out all such contracts made with Sub-Limited Agents under the second party, as were made with the approval of the first party as herein provided, the intent being that the first party shall take the same off the hands of second party.

TERMINATION

(51) Upon termination of this contract, whether by expiration or cancellation, all liability on the part of the first party, shall, except as to matters pending at the date of such termination, cease and determine, and the second party shall have no claim to commission, rebate or damage, notwithstanding transactions may thereafter take place with or sales be made to parties with whom the second party shall have dealt during the currency of this contract

NO WAIVER OF THESE PROVISIONS

(52) The failure of the first party to enforce at any time any of the provisions of this contract, or to exercise any option which is herein provided, or to require at any time performance by the second party of any of the provisions hereof, shall in no way be construed to be a waiver of such provisions, nor in any way to affect the validity of this contract or any part thereof, or the right of the first party to thereafter enforce each and every such provision.

MICHIGAN CONTRACT

(53) This contract, it is agreed, is a Michigan contract and shall be construed as such.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

Signature of the First Party

FORD MOTOR COMPANY,

By *W. A. Ryan-A.* (L. s.)

Manager of Sales.

Approved *F. B. Norman,*

Branch Manager.

O. K.'d *J. S. Beckhardt,*

Accounting.

Ckd. and App. *E. W.,*

Sales.

Signature of the Second part

Eugene Ford Auto Co. (L. s.)

By *F. M. Hathaway (L. s.)*

Witness *Chas. E. Godon,*

First National Bank.

(Name of Limited Agents Bank)

Trial balance, July 31, 1915.

C. R., Aug. 13, 1915, page 15.

C. R., Sep. 9, page 40.

Mr. McDougal: I also desire to offer in evidence letter dated May 25, 1916, signed Ford Motor Company, F. B. Norman, Manager, admitted to have been received by the Eugene Ford Auto Company, at Eugene, Oregon, though registered mail.

Marked PLAINTIFF'S EXHIBIT 2.

“Portland, May 25th, 1916.

Eugene Ford Auto Company,

Eugene, Oregon.

Gentlemen:

In accordance with the provisions of Sub-divisions 46 and 47 of your contract, notice is hereby given of the cancellation of your Limited Agency Contract with the Ford Motor Company effective as of this date.

In this connection, attention is called to Sub-division 47 of the contract relating to the winding up of the

affairs of the Limited Agency in the event of the cancellation of the contract.

Ford Motor Company,
F. B. Norman, Manager."

CROSS EXAMINATION

(Questions by Mr. Hardy)

Q. Did you not send a telegram previous to sending the letter?

A. Yes, sir.

Q. A telegram stating—

Mr. McDougal: If the court please, I object. The telegram is the best evidence.

Q. Have you the original of that telegram?

A. I have not.

Q. Did you keep an office copy?

A. Yes, I imagine so.

Q. Can you produce it?

A. I don't know. I think so.

Q. I would like to have you produce it, if you please.

A. Yes.

Mr. McDougal: We will produce it if we can find it.

Witness excused.

Charles E. Goden, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

(Questions by Mr. McDougal)

Q. Were you down to Eugene to interview Messrs. Winchell and Hathaway, subsequent to May 25th, the date upon which this registered letter was mailed to Winchell and Hathaway, cancelling their contract?

A. About that date, yes, sir.

Q. For what purpose did you go down there?

A. Instructions from the Ford Motor Company, my manager Mr. Norman, to go there and displace them as agents, and place Vick Brothers in that territory.

Q. What did you do when you first went down there?

A. Well, I got in there—went to Hathaway and Winchell's office or place of business, the Eugene Ford Auto Company, and told them that I had been sent there for that purpose, cancelling the contract, and they received the registered letter at the time I was in their office. I said "That is your notification of cancellation, which is according to the rules of the contract." They said "Yes, we understand that; we expected it."

Mr. Goden further testified as follows:

And I called their attention to the clause in the contract which provided for this cancellation, and also the proviso of taking the cars back, and they said "Where is that clause," Mr. Winchell said. I told him and showed it to him, and he took a copy of the contract and invited me to go to the attorney's office, and I said, "No, I will not go to your attorney's office. I have nothing to do with attorneys. When I go to your at-

torney's office, my attorney will be with me," and he went off with the contract.

Q. Could you find the clause of the contract that you read to them?

A. If I remember, it is 43.

Q. Just take exhibit 1, and see if you can find the clause in the contract.

A. I think it is in 22 here—yes, it is in paragraph 49 of this contract "Sale of Autos on hand at Time of Termination." That is the clause.

Q. All right. Just read that to the jury.

A. "49. In case of the cancellation or expiration of this contract the first party may at its option retake possession of all of such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided, however, if, after reasonable effort on the part of second party to make such sale there shall remain on hand any such automobiles unsold after three months from date of such cancellation or expiration then on request by second party and payment by him to first party of ten per cent (10%) additional of the list price first party will sell said automobiles to said

second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.” That went along to the fact—I took this clause along to show that they didn’t have them sold until the ten per cent provided—

Mr. Goden further testified:

DIRECT EXAMINATION

(Questions by Mr. McDougal)

Q. Will you state whether or not at any time subsequent to May 26th you ever made any tender of the advancements on these machines by Winchell and Hathaway.

A. Before May 26th?

Q. Subsequent to May 26th.

A. Oh! yes, the company forwarded to the bank in Eugene telegram to honor my draft in payment of the \$16,077, I believe, and some odd cents—I forget just exactly the figures—in payment of a check payable to Hathaway and Winchell for automobiles, and the bank was to notify me that the check was there—the money was there at my disposal but only for that purpose—could only sign a check for return to them—for Hathaway and Winchell. The telegram specified that was the only use I could make of this money.

Q. You say you had this \$16,077.50 in the bank there at Eugene?

A. A telegram authorized the draft and the bank notified—I saw the banker and he said it was there, and that I could sign it for that purpose.

Q. Will you state whether or not you made any effort to get this money and give it to Winchell and Hathaway?

A. Yes, I attempted to get Winchell and Hathaway, if I remember right, on the day I had the money in the bank to use, but I believe one was in Portland, or some delay, I couldn't see them until evening. I at first demurred and thought I would take it up the next morning; they said, "Well, we will meet you." I said, "All right, you can come to the hotel then." And they closed their place of business at six o'clock and I was at the hotel. I said, "Come on up to my room, and we will talk the matter over," and Mr. Vick—yes, I believe Mr. Vick was with me. So when he got to the hotel, Mr. Hardy was with him, their attorney. They said, "This is Mr. Hardy" in the lobby, and we all walked up to the room, and I said, "Now, I have the money in the bank to pay you for those automobiles you have in your possession," and Mr. Winchell said, "You mean cash," and I said, "Yes, I have got the cash." He says, "I won't do anything without I get cash from the Ford Motor Company." I said, "all right, the cash is in the bank. I can't get it tonight but will get it in the morning." He says, "You mean you can get it in the morning? It is there?" I said, "Yes, it is there." I said, "Are you willing to accept that?" And their attorney spoke up in the conversation, and I said, "I don't recognize you. I am not talking to their attorney. I asked to talk to Mr. Winchell and Hathaway, and I don't recognize you at all in this." He says, "I am their attorney." I says, "That don't make any difference, and I didn't ask you

to the room.” With that he started to walk out, and he says, “We will take it under advisement.” And I said, “No advisement in this case.”

Q. Was there anything said there at that time by Mr. Hardy or any one else with reference to whether or not they understood this to be a tender?

A. Yes, I took it up with that action, that I was tendering them the money.

MR. SMITH: We move to strike out that answer, and ask to have him answer the question.

COURT: State what was said about it.

Q. (Read as follows: Was there anything said there at that time by Mr. Hardy or anyone else with reference to whether or not they understood this to be a tender?) Just answer that question.

Q. By any one else?

Q. (Read.)

A. Yes.

Q. Who said that? Who made the statement?

A. I made the statement to Vick Brothers at the time that we were going to tender them this money. We went up there. I told them to come up as a witness I was tendering this money.

Q. Well, was anything said by Mr. Hardy—

MR. SMITH: I move to strike that out; that is not responsive to the question—what he said to Vick Brothers, outside the presence of these defendants has nothing to do with this case.

COURT: State what you said to the defendants.

A. I said, “I am here for the purpose of making a tender to you of this money for these automobiles,

according to the contract." And then he spoke up and said, "Well, we will take that under advisement."

Q. Did you the next day make any attempt in any way to tender this money again?

A. Not excepting meeting, I believe it was Mr. Winchell on the street, and telling him the money was ready for them if they wanted it.

Q. Was anything said by you, or any invitation extended to them to come to the bank?

A. I told them that their banker had received a telegram to that effect, that it was there. It was their same banker, you see, that got the notice.

Q. Mr. Goden, did you make a demand upon the defendants here for the possession of these cars?

A. No, I didn't make the demand.

Q. You at no time made any demand for the possession of the cars?

A. Not I.

CROSS-EXAMINATION

(Questions by Mr. Hardy)

Q. Now, did you offer Winchell and Hathaway that Friday night, in the hotel, cash?

A. Told them it was in the bank. I couldn't get in the bank then.

Q. Did you offer them a check for the money?

A. Told them I had the right to draw check, yes.

Q. You simply told them that the money was there and you could give a check the next morning, and I told you we would take it under advisement, didn't I, and you said the offer was withdrawn, didn't you?

A. I told you at the time, speaking to you at the time, as far as you were concerned, the offer was withdrawn. I was talking to Hardy.

Q. You knew I was representing Hathaway and Winchell?

A. Not the way you came. You didn't say so until you got to the room.

Q. They told you I was their attorney?

A. Not until we got in the room.

Q. And we three came into the room?

A. The fact is, I didn't know you were following me up, going into the room.

Q. You didn't put me out of the room?

A. No, I didn't.

Q. And you told us then and there the money was in the bank and you could give us a check the next morning?

A. Yes.

Q. That is as far as you went in making a tender, when you said that?

A. I said this—I want to correct you. I said, "According to the contract the money was in the bank to pay them for the amount of money they had invested in these cars."

Q. When I told you we would take the matter under advisement, didn't you then and there say the offer is withdrawn?

A. I said, "No advisement in this case as far as you are concerned." The offer was withdrawn. That was you.

RE-DIRECT EXAMINATION

(Questions by Mr. McDougal)

Q. And you at no time, prior to the Monday that the marshal took these automobiles, asked them for the automobiles in question?

A. No, I do—No.

Q. Made no demand upon them?

A. No.

Mr. Norman further testified as follows:

CROSS-EXAMINATION

(Questions by Mr. McDougal)

MR. McDOUGAL: Here is the telegram you asked for.

Q. Is this the telegram that you sent to Winchell and Hathaway before you sent the registered letter?

A. Yes, sir.

MR. HARDY: We offer it in evidence, if your Honor please.

MR. McDOUGAL: For what purpose is that offered in evidence? To show cancellation of the contract?

MR. HARDY: The purpose it is offered in evidence for is it tends to show your course of conduct towards us. Tends to show malice, too.

Marked DEFENDANTS' EXHIBIT E and read as follows:

“Portland, Oregon, May 24, 1916.

Eugene Ford Auto Co.,

Eugene, Oregon.

Be advised that your contract is cancelled. The territory and your stock will be taken over by Vick Brothers who will open a branch at Eugene.

FORD MOTOR COMPANY."

Witness excused.

V. W. Winchell, a witness called on behalf of the defendants, testified as follows:

Q. Mr. Winchell, you received a telegram, did you, of which copy was offered in evidence?

A. Yes, sir.

Q. And the registered letter?

A. Yes, sir.

F. M. Hathaway, a witness called on behalf of the defendants, testified as follows:

Q. Were you in Eugene at the time this telegram was received that was in evidence?

A. Yes, sir

Mr. Hathaway further testified as follows:

Q. Who went to the hotel?

A. Well, Mr. Winchell and I, our attorney, Mr. Hardy, went to the hotel that evening, and met Mr. Goden and Mr. Vick in the lobby and we introduced each other all the way around, and Mr. Goden suggested that we go up to his room, so we did so, and Mr. Winchell asked Mr. Goden if he was ready to pay over the cash—the money; well, Mr. Goden said that he couldn't do that; that after interviewing the managers at Portland, why, they had objected, but they had agreed to pay over the 85 per cent list price of the cars in question on the cars what we had in stock at that time.

Q. What about the contract money and bonus money? Your own money that was deposited and your bonus money?

A. Well, he said that could be taken care of afterwards. He says, "I can't say you may just have to scrap that out with the Ford Motor Company, but I am prepared to pay the 85 per cent.

Q. Well, what else was said?

A. Well, we told him that we couldn't consider a proposition of that kind; that we were entitled to our bonus money and also to our deposit, and he said, well he says, "I am only authorized to pay you the 85 per cent," and he says, "I have the authority, or have the money at the First National bank, and can make you a check tomorrow morning."

And it is hereby certified that the foregoing is all of the evidence that was introduced by plaintiff at the trial of this cause relative to any tender by plaintiff to the defendants Winchell and Hathaway of their payments to the plaintiff for the automobiles described in the complaint. And the only evidence offered by plaintiff at the trial of said cause relative to any demand being made upon the defendants Winchell and Hathaway for the automobiles in question prior to the commencement of this action.

Mr. Hathaway further testified as follows:

DIRECT EXAMINATION

(Questions by Mr. Hardy)

Q. Do you recall then what I said?

A. Well, Mr. Hardy mentioned that we would

take this under advisement, and immediately Mr. Goden mentioned that the deal was off; well, Mr. Hardy says, "then it is time for us to go. We will just simply take this under advisement." And we got out, half way to the door, and Mr. Goden repeated that.

Q. Repeated what?

A. That the deal was all off; and when we got out to the elevator and was stepping in and he followed out there, and Mr. Vick and Mr. Goden said that the deal was all off.

Upon the trial of this case counsel for the plaintiff contended that the contract, being plaintiff's exhibit 1 was a consignment contract leaving the title to the automobiles in controversy in the plaintiff until they had been finally sold by the defendants.

Counsel for the defendants contended that the contract under which the automobiles in controversy were sold was not a consignment contract and that title to the automobiles in question passed to the defendants upon the payment of the eighty-five (85 per cent) of the purchase price therefor, provided for in said contract.

After the close of all the evidence the court instructed the jury, amongst other things, as follows:

"Now, the contract as entered into between the plaintiff, The Ford Motor Company, and the defendants, as I said, was dated September 10, 1915. It expired by limitation on the 31st day of July, 1916, but it contained a provision that either party to the contract might revoke or cancel it at any time without cause—without giving any reason for it, and it appears in testimony that the Ford Motor Company, exercising the right given by this

contract, did in fact cancel it by a telegram which it sent to the defendants, and by registered letter which was received by the defendants prior to the time this action was instituted. It also appears in testimony that at that time the defendants had in their possession some 37 cars which they had previously ordered from the plaintiff, upon which they had paid 85 per cent of the list price, or all that they were expected or required to pay under the contract. The plaintiff company, upon the cancellation of this contract was entitled to a return of the cars which the defendants had on hand at the time, upon the payment or repayment to them of the amount of money which they had advanced or paid for the cars, which is admitted by the parties to this case to be \$16,077.50, so that the plaintiff would have been entitled to the possession of these cars if it had paid to the defendants the \$16,077.50, but the evidence shows that it did not make such payment nor did it tender to the defendants that amount or any other amount on these cars, and therefore it was not entitled to the possession of the cars at the time this action was brought, and inasmuch as it was not entitled to the possession the action was wrongfully brought and the defendants are entitled to a return of the cars, or their value in case a return cannot be had, so that in any event it will be your duty, under the law, to find a verdict in favor of the defendants to the effect that they are entitled to a return of these cars, or their value in case a return cannot be had."

To the action of the court in instructing the jury that the plaintiff did not make a sufficient payment or

tender to the defendants, and was, therefore, not entitled to the possession of the cars in controversy, the plaintiff duly excepted, which exception was allowed.

Upon the trial of the above entitled cause the plaintiff requested the court to instruct the jury as follows:

IV.

I instruct you that payment to the defendants of advancements on the said automobiles by defendants before taking possession of the same, by the plaintiff, was not necessary if the defendants informed plaintiff or led plaintiff to believe, they would not accept said payment.

To the action of the court in refusing to give the above instruction, being plaintiff's requested instruction IV, the plaintiff duly excepted, which exception was allowed.

V. W. Winchell, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

(Questions by Mr. Hardy)

Q. Now, as I understand it, the price at which you could sell these cars was \$493.25?

A. \$493.25.

Q. For each of the touring cars?

A. Yes, sir.

Q. At what price could you sell these cars?

A. \$493.25.

Q. And you were carrying on your business in the usual course were you?

A. Yes, sir.

Q. At the time the cars were taken?

A. Yes, sir.

Q. And you had prospects?

A. Yes, sir.

Q. Selling cars right along?

A. Yes, sir.

Q. State to the jury what the fact is as to whether or not in the ordinary course of your business, from the time these cars were taken up to the first of August you could have sold these thirty-six touring cars at that price to the public.

A. Well, the best way that I can state that to the jury would be that at the time we were interfered with by the Ford Motor Car Company, it took away from us the two best months of the year, two best selling months, the height of the automobile selling season, June and July. Our contract ran from August to August. Another thing to substantiate that fact is the amount of business that Vick Brothers did at that same station from the time we were practically thrown out. They sold—

MR. McDOUGAL: If the court please, I object to any testimony as to what Vick Brothers did.

Q. State whether or not you could have sold the cars in the ordinary course of business at that time.

A. We certainly could, yes, sir.

Q. As I understand it, the selling price of the Sedan was \$983.25. Is that right?

A. I think so.

Q. That is, I mean you would sell it to the public.

A. Yes, sir.

Q. Now, if including these cars you purchased 179 cars, as a mathematical proposition you had sold during the year 179 less 37. Is that right?

A. Yes.

Q. Or 142 cars that you had sold during the year?

A. That is in our territory.

Q. Now, who fixed the selling price of these cars?

A. The Ford Motor Company.

Q. The plaintiff in this case?

A. Yes, sir.

Q. And they may dictate to you the price at which you should sell the cars?

A. Yes, sir.

Q. And they fix the value then, at Eugene, of \$493.25, for a touring car?

A. Yes, sir.

Q. And \$983.25, for a Sedan?

A. Yes, sir.

Q. And you were supposed to be content with that profit?

A. Yes, sir.

Q. Now, since the company took the cars, have you been out of business?

A. Yes, sir.

Q. Just been waiting there at Eugene until this matter was disposed of?

A. Yes, sir.

Q. Were you able to engage in any other business during this interim?

A. Lack of funds. Our money is tied up.

Q. You have never received a dollar from the Ford Motor Company, have you?

A. No, sir.

Q. They have never put the money in front of you where you could get it?

A. No, sir.

Q. If you wanted it. Now, what kind of business—tell the jury what kind of business you were doing there. What was your average profit, outside of the price of the cars, running the garage and selling parts and gasoline and oil?

A. Well, the profit varies, but I should think—

Q. What would it average?

A. (Continuing) that a fair average of our profit would be a third—30 per cent on the garage business. The cars are 15 per cent but we were enjoying a very nice business. Naturally our being the Ford agents there we corral practically the most of the Ford business.

Q. What did it amount to a month, on the garage business?

A. Oh, I haven't—

Q. Just approximately.

A. Approximately \$300.00.

Q. \$300.00 a month?

A. Yes, sir.

Q. That was selling what?

A. That is the parts and accessories, gas and oil, and stuff of that kind.

Q. That wasn't involved in the Ford contract at all?

A. No, sir.

Q. And how many automobiles were you able to take from the first of August, 1915, to the first of August, 1916?

A. 286.

Q. And you would have had your profit on each of those cars?

A. Yes, sir.

Q. That would be 15 per cent on every car?

A. Yes, sir.

Q. How many did you sell from the first of August, 1914, to the first of August, 1915? Would 161 be about right?

A. I think that was the amount, yes, sir. Mr. Hathaway took that off the books.

Q. I have a memorandum here from the first of August, 1913, to the first of August, 1914, 88 cars.

A. Yes, sir.

Q. What is the fact as to whether or not the business was increasing in that proportion. About doubling each year?

A. Yes, sir.

Q. Now, one of the witnesses has testified that after this case was commenced and after the cars were taken, somebody has gone into the First National bank of Eugene and paid some debt of yours there. Did you ever authorize anyone to do that?

A. No, sir. I didn't know of that being done.

Q. Was it done with even your knowledge?

A. No, sir.

Q. Long after the action was commenced and your answer filed?

A. Yes, sir.

Q. In this case, now, have you ever received the five per cent additional bonus on the 179 cars?

A. No, sir.

Q. I believe you testified that Mr. Goden agreed that they would give you that?

A. Yes, sir.

Q. So that as a total you would be entitled to 20 per cent on 179 cars, 15 per cent plus 5 per cent bonus?

A. Yes, sir.

Q. And you have never received the \$800.00 of your money that the company has?

A. No, sir.

Q. Tell the jury what kind of a building you had in Eugene, where it was located, and the size of it.

A. Our building was—our floor space was, I think, 50 feet wide by about—oh, I don't know the depth—95 or 100 feet deep, three blocks from the main street there; it was a concrete building.

Q. Now, I wish you would tell the jury whether or not your business was decreasing or increasing.

A. Our business had been on the increase ever since we had taken hold of it.

Q. And all your capital is invested in these cars, and you haven't received it. Is that correct?

A. Yes, sir.

Q. Now, when the Ford Motor Car Company took possession of these cars under the writ of replevin, that

was after you had agreed to, or had a tentative agreement to sell out the other business to Vick Brothers?

A. Yes, sir.

Q. When the Ford Motor Car Company took all these cars that you had bought and paid for, who since then has had possession of the gasoline and garage business?

A. Vick Brothers of Salem.

Q. The whole business has been taken away from you.

A. Yes, sir.

Q. And you have been turned out of the building itself, have you?

A. Yes, sir.

Q. Now, in your answer you claim the value of these cars, these thirty-six touring cars to be at \$493.25?

A. Yes, sir.

Q. And the Sedan at \$983.25?

A. Yes, sir.

Q. And none of that money you have received at all?

A. No, sir.

Q. And in addition to that there is your \$800.00?

A. Bonus money.

Q. No, deposit money.

A. Contract deposit money.

Q. And the 5 per cent bonus on the amount of thirty-six touring cars at \$493.25, and the Sedan at \$983.25?

A. Yes, less a partial payment probably six months ago, sometime ago, on this bonus money.

Q. That is six months ago you received some bonus money?

A. Yes, sir.

Q. And when you and Mr. Goden figured up the bonus money that he said he would get you, what did you figure it up at, at that time?

A. I can't give the exact amount.

Q. You can get that, can you. You have a memorandum?

A. Yes, we have a memorandum.

Q. All right, I won't ask at the present time. And in addition to that is your \$800.00?

A. Yes, sir.

Q. Besides the money you paid for the cars?

A. Yes, sir.

Mr. Winchell further testified as follows:

CROSS-EXAMINATION

(Questions by Mr. McDougal)

Mr. Winchell, what was the consideration for the sale of this garage?

A. You mean by that, the amount?

Q. Yes, what did you get for it?

A. Why, it was—I will have to refer to our records. It was in the neighborhood of two thousand for the part Vick Brothers were to take—wasn't it—eighteen hundred and something, if I remember correctly.

Q. Well, but if I understand it, Mr. Winchell, didn't Vick Brothers—you took an inventory of the stock, didn't you?

A. Yes, of the stock we had on hand at that time.

Q. Stuff you had on hand?

A. Outside of the cars.

Q. Then you turned it over to Vick Brothers dollar for dollar, for what it cost you?

A. Yes, sir.

Q. That is all you did get?

A. Yes, sir.

Q. And you want the jury to understand you were selling out a business that was paying you fellows net \$300.00 a month, dollar for dollar?

A. We got nothing for our business; we merely sold the stock and fixtures, merchandise we had on hand, accessories and stuff of that kind.

Q. What were you going to do with your business? You say you got nothing for the business?

A. I don't quite understand.

Q. You say you got nothing for the business. Did you give them the business in addition to the stock that they took over?

A. Yes, with a view of going into something else.

Q. You just threw that in with the stock?

A. Yes, sir.

RE-DIRECT EXAMINATION

(Questions by Mr. Hardy)

Q. Did they tell you that the reason they had cancelled the contract was because you had sold one or two cars for less than \$493.25?

A. No, sir.

Q. Did they intimate that was the reason they were taking the cars away from you?

A. No, sir.

Q. Mr. Winchell, it has been intimated or suggested that you sold the garage business to Vick Brothers. Was that deal completed when these cars were taken—with Vick Brothers. Did you ever get your money from Vick Brothers? Did they ever pay you up?

A. No, sir.

Q. What is the fact as to whether that was made part of the sale to the Ford Motor Company?

A. I understood it as such.

Q. That is on the Goden deal?

A. Yes.

Q. That they backed out of afterwards?

A. Yes, sir.

Q. And you have a case pending in Lane County that Vick Brothers brought?

A. Yes, sir.

Q. And that is not disposed of or settled?

A. No, sir.

Q. You were asked if you didn't have the agency for the Dodge cars. What is the fact as to whether or not the Ford Motor Car Company forced you to give up the Dodge agency?

A. That was the reason we gave up the Dodge line, because the Ford Motor Car Company compelled us to do so.

Q. And after that you still went ahead on the Ford?

A. Yes, sir.

Q. For how long, before they took the cars away?

A. Pretty near a year, I guess.

F. M. Hathaway, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

(Questions by Mr. Hardy)

Q. Now, you describe to the jury the kind of business you were doing there, whether it was an increasing or decreasing business, the character of the business.

A. Our business was on the increase from year to year, and increased according to the number of cars that we were selling; what I mean by that is that each and every car we sold, we sold more or less accessories on, and done more or less work for. As they would become old, why, we had to do various work for them—various kinds.

Q. What do you estimate that general business, outside of the sales of the cars, as to your profit?

A. We always figured that our business was paying—well we thought conservatively three hundred a month—our garage end of the business.

Q. Then there was the profit on the cars besides?

A. Yes, sir.

Q. And you made 15% on the cars besides the bonus?

A. Yes.

Q. Now, you have been there doing business three years. What is the fact as to whether you had got pretty well acquainted in Lane County?

A. Well, Eugene is not a very large city, and we had opportunity of becoming very well acquainted, because we had an established business there, and were known all throughout the county mostly, with the exception of over on the coast.

Q. What would you say as to whether or not you had the good will of the people up there—I know you are modest about it?

A. I would rather somebody else would say that. Why, I think we stood pretty well in the community.

Q. Please tell the jury what other offers you have had this summer to go into business.

Mr. McDougal: I object, as incompetent, irrelevant and immaterial; that is objected to; it certainly would not tend to show damages in this case.

Mr. Hardy: It would show we are tied up so we couldn't go into business. We could have gone in if we had had the money.

COURT: Ask if they did go into business, and if not, why not.

Q. Did you have any other opportunities to go into business this summer?

A. Well, Mr. Winchell and I—at this time when my mother drove over into Eastern Oregon, and when we arrived at Pendleton, Mr. Simpson, of the Ford Motor Company there, their representative, told us there was a man there waiting us at the hotel, for a couple of days—

Q. Just tell what the offers were. Don't go into all the details.

A. He wanted to offer us the Studebaker line. Then when we got over to Walla Walla we had an opportunity to take on the Buick line there, but on account of lack of funds, our funds being tied up, we were not able to do anything.

Q. Your money being tied up in these Ford cars?

A. Yes, sir.

Mr. McDougal: Will the Court allow an exception to my objection?

COURT: Yes.

Q. So you have not been able to go into any business on account of your capital being tied up in this manner?

A. Until we get our money.

Q. Tell the jury the number of cars and the amounts that were to be paid for the cars.

A. There were 36 touring cars and one Sedan, and we were to have paid 85 per cent of the list price at Detroit.

Q. Well, you have it on your card there the amount you had paid for each of these cars?

A. We paid in the neighborhood of \$374 for the touring cars, \$331.50 for the runabout and \$786.25 for the Sedan. Then there was the additional \$53.25 that we paid freight from Detroit to Eugene. Also an additional \$5.00 extra on the Sedan; it costs a little more.

Q. State to the jury whether or not there was any further amount to be paid by you.

A. No, sir.

Q. Then when you sold the cars you got your profit?

A. Yes, sir.

Q. And if you didn't sell them, you didn't get the profit—is that right?

A. They remained ours.

REDIRECT EXAMINATION.

(Questions by Mr. Hardy.)

Q. Did you want to sell your business to Vick Brothers, your gasoline business?

A. We had no desire to sell it.

Q. What is the fact as to whether or not that is a part of the transaction which Goden said you had to make to get out?

A. We considered that they were joined together—negotiating the deal together.

Q. Did they come there together?

A. They came there together and we were notified by telegram, as was read here before, that Vick Brothers would take over our business; that is the first we knew anything about it.

Q. That is, the Ford Company selected the person that you had to sell to; is that right?

A. Yes, sir.

Q. And you felt after what was said to you that you had to go through with the deal as he outlined it?

A. Yes, sir.

Q. If it hadn't been for the action of the Ford Motor Car Company would you have dealt with Vick Brothers? Would you have had any notion of selling this business?

A. No, we had no notion of selling out; we were going along.

COURT: Was your transaction with Vick Brothers prior to the time the cars were replevined?

A. Yes, it was, the time that we negotiated—that is, began to talk to Mr. Goden; he seemed so positive that the deal would go through just as he stated, that we immediately began afterwards to invoice, before he came back from Portland.

COURT: When was it that Vick Brothers paid you the thousand dollars?

A. That was after the invoice.

COURT: Before or after the time that the United States Marshal took possession?

A. That was before the time.

COURT: Before the Marshal took it?

Mr. Hardy: Set out in these pleadings, your Honor, the date, the 29th of May; on the 26th they got the letter cancelling.

COURT: Now, Mr. Hathaway, I understood from your testimony that you claim that the action of the Ford Motor Company in cancelling their contract and replevining these cars destroyed your garage business.

A. Yes, sir.

COURT: And that by reason of the fact that you had to close that up or sell it out. Is that the idea?

A. It seems as though Vick Brothers put up a deposit there with the court and took over the business, you see.

COURT: You are claiming here, as I understand

it, that you were compelled to virtually close this business because the Ford Motor Car Company cancelled their contract and replevined these cars that you had previously ordered and paid for?

A. Yes, sir.

COURT: And that was the reason you had to close your garage. Now, do I understand from that that you would not have been able to have carried on this garage business if the Ford Motor Car Company had refused to furnish cars—sell you cars?

A. We could have carried on a general garage business because we were well known in the community, and, for instance, our mechanic who was working for us immediately went off to himself and started up a little place repairing cars, and is doing a nice business at the present time.

COURT: Then how do I understand that you base your claim that the replevining of these cars destroyed the garage business? You understand this contract only had two months to run, and in any event at the end of that time the company would have been under no obligations to sell you cars.

A. Well, you see, Vick Brothers had a deposit on our business and they had us tied up, you see, in a way.

COURT: On what part of your business?

A. On the garage end—accessories and parts.

COURT: That is because of their contract or agreement with you?

A. Yes, sir.

COURT: Your idea is then that the failure of the Motor Car Company, if I understand you correctly—

the failure of the Ford Motor Company to carry out the preliminary agreement that you had with Mr. Goden was really the cause of your trouble.

A. Yes, sir.

COURT: That is the idea?

A. Yes, sir.

Mr. Hardy: If I may explain, that is set up in this answer that is offered in evidence—a three-cornered deal.

COURT: What I couldn't get clear through my mind was how the mere taking of these cars by the Ford Company away from these people could destroy their garage business, when that contract only ran for two months.

Mr. Hardy: They forced us as a part of it—

COURT: I understand now. I haven't examined this contract, but I suppose it is like all these contracts, and there was no obligation on the part of the Ford Company to furnish these people any cars.

Mr. McDougal: The same contract we had up—

COURT: Optional with the company whether they furnished any cars at all, and optional with the dealer whether they would take them.

Mr. Smith: Not optional; the dealers they had to take them.

Mr. McDougal: The dealer could cancel.

COURT: Either company could cancel, and the dealer was not obligated to take any cars, nor the company obliged to furnish them. That is all. I just wanted to understand his theory. I couldn't get it.

The above was all the evidence introduced by the

defendants upon the trial of the above entitled cause to establish damages to their business by virtue of the alleged wrongful action of the plaintiff in seeking to recover possession of the automobiles in question.

Upon this branch of the case the court instructed the jury as follows:

“Now the defendants claim and allege that their business was entirely destroyed. You have heard the testimony upon that question and it is for you to say whether or not the taking of these thirty-seven cars from their possession and the circumstances under which they were taken destroyed or injured their business, and if so, to what extent, if you can arrive at that conclusion. They allege in their answer that their business was paying an income of \$300.00 a month and that they were deprived of that income by reason of the wrongful acts of the plaintiff company.

Now, in estimating the damages you should keep in mind the amount that you allow as the value of these cars. The taking of the cars away from the defendants, of course, deprived them of the right to sell them and of any profits that they might have derived from the sales. That was one thing that, of course, was the result of this taking of the cars by the plaintiff company. Now, the profits on the sales would, of course, be a matter to be considered by the jury in arriving at your verdict in this case, but if you allow that on the value of the cars, that is, if you find that the value of the cars is the amount that is claimed by the defendants, which is the wholesale price with the 15% added, or the profits that the defendants would have made if they had sold

the cars, then you should not allow that same profit in estimating the damages. In other words, you should be careful not to allow the same item twice in the item of damages.

Now, the burden of proof is upon the defendants in this case to show by evidence which satisfies the jury, so that you can arrive at an intelligent and satisfactory verdict as to the amount they were damaged, if any, by this act of the plaintiff. It should not be based upon speculation nor conjecture, but upon the facts and circumstances of the case as disclosed by the testimony."

To the action of the court in giving the above instruction to the jury, the plaintiff duly excepted, which exception was allowed.

Plaintiff requested the following instruction upon the question of damages:

XI.

The burden is upon the defendants to prove by a preponderance of the evidence that the automobiles here in question are of the value they allege, namely, \$18,555.25, and that they have been further specially damaged in the sum of \$25,000.00, and unless defendants do convince you by a preponderance of the evidence to this effect, then they have failed and your verdict should be against them."

To the refusal of the court to give said instruction to the jury the plaintiff excepted, which exception was allowed.

The plaintiff also requested the court to give the following instruction:

B.

"I instruct you that the defendants have failed to prove damages in this case and that the only question for you to decide is who are the owners and entitled to the possession of the automobiles in question and their value."

To the action of the court in refusing to give plaintiff's requested instruction B, plaintiff duly excepted, which exception was allowed.

F. B. Norman, a witness called on behalf of the plaintiff, testified as follows:

Q. What became of this \$12,676.38 that was sent down to Eugene for the purpose of returning to the defendants in this case?

A. That was paid to the bank on mortgages they had given for these cars.

Mr. Smith: We move to strike that out if the court please. There was no payment before this action was begun at all and no payment to us, or for us, or with our authority, to anybody.

COURT: They will have to show that was done with the authority of the defendants, or paid to them before the action was commenced, as I understand it.

Q. For what purpose did you say this was paid to the bank, this money?

A. Money that they had advanced on these cars for the Eugene Ford Auto Company.

Q. Do you know whether or not it was impossible for the Ford Motor Car Company to get possession of these cars, as far as the bank was concerned, until this money had been paid to the bank?

Mr. Smith: Objected to; that calls for a conclusion of the witness. Let him state the facts if they will justify such a position, and the man knows.

COURT: I think the objection is well taken, and I don't see that it has anything to do with the merits of this particular case on trial now.

Mr. Smith: They took the cars under the writ. It is admitted here that the Deputy Marshal was down there and took the cars immediately after Mr. McDougal's brother made the alleged demand on that Monday morning.

F. B. Norman, the said witness, on behalf of the plaintiff, further testified as follows upon cross-examination:

Q. At what date do you claim you gave the First National Bank at Eugene the twelve thousand dollars?

A. Sixteen thousand, I think it was, the value of the cars. I don't remember the dates now. It was at the time, though, after the cancellation went into effect.

Q. You don't know the date?

A. I haven't it here, no.

Q. You don't know how much you gave the First National Bank either, do you?

A. Well, I don't remember the figures.

Q. It was after this action was begun? You know that, don't you?

A. Not that I know of, no.

Q. Don't you know, as a matter of fact, that it was not only after that action was begun, but after the answer was filed?

A. No, sir.

Q. You don't know that that statement is not true, though, do you?

A. There was no action begun at the time I authorized this money from the Lumbermens Bank to be sent to Eugene.

Q. No, I mean at the time you paid it to the bank. You say you paid some money to the First National Bank at Eugene. Don't you know as a matter of fact, you didn't do that until after this action was commenced and after the answer was filed?

A. That is probably so, I wouldn't say.

V. W. Winchell, a witness called on behalf of the defendants, testified as follows:

Q. Now, one of the witnesses has testified that after this case was commenced, and after the cars were taken, somebody has gone into the First National Bank of Eugene and paid some debts of yours there. Did you ever authorize any one to do that?

A. No, sir. I didn't know of that being done.

Q. Was it done with even your knowledge?

A. No, sir.

Q. Long after the action was commenced and your answer filed?

A. Yes, sir.

Thereupon the defendants made the following motion:

Mr. Smith: There are two or three motions in relation to the record we want to make to keep the record straight on the evidence. We first move to strike from the consideration of the jury all evidence offered on be-

half of the plaintiff as to the payment to the First National Bank of the twelve thousand dollars on the ground that it was not authorized by the defendants or made through any privity of relationship requiring plaintiff to make such payment. Upon the further ground it was a voluntary payment if made at all and cannot be charged to the defendants under any circumstances.

And thereupon the court made the following ruling:

COURT: I think that is well taken as far as constitutes any defense in this case.

To the action of the court in taking from the consideration of the jury the claim of the plaintiff for the amount of money paid by the plaintiff to the First National Bank of Eugene, Oregon, the amount of the lien imposed upon the automobiles in controversy by the defendants, the plaintiff duly excepted, which exception was duly allowed.

After the close of all the evidence introduced upon the trial of the above entitled cause the defendants made the following motion for a directed verdict:

Mr. Smith: The defendants move that the jury be instructed that the plaintiff has no cause to submit to them, under the plaintiff's own evidence, first because the contract involved is in violation of the Sherman Anti-trust Act and the Clayton Act, and being violative, the title to the cars absolutely passed when the drafts were paid, and that the plaintiff itself has shown that the plaintiff has no title to the cars whatsoever, but they were fully paid for by these drafts, and the title is in the defendants, and at the time this

case was instituted the defendants owned the cars absolutely. Second, that the plaintiff has proved no demand before entering this action, and even if the contract were not in conflict with the Anti-trust Acts of the United States, it provided they would have a lien on these cars for the amount of money they advanced, and they never extinguished or offered to extinguish that, but began suit without any demand or tender.

COURT: Isn't there a provision in the contract by which the plaintiff company could recover possession of these cars upon payment of advances?

Mr. Smith: They haven't paid them. There is a provision to this effect: "This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation for all orders for automobiles, automobile parts or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect.

In case of the cancellation or expiration of this contract the first party may at its option retake possession of all of such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration, at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for

the purpose of winding up the affairs of his said limited agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration, the same to be made strictly under and in accordance with the terms of this contract, provided however, if after reasonable effort on the part of second party to make such sale there shall remain on hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make."

My point is they were all sold and were not consigned. That consignment we say depends upon the prior contract which we say is violative of the anti-trust laws. We take it that the transaction was an absolute sale and not consignment. They attempt to treat these cars as having been consigned but they didn't tender the amount we had paid into them, and right there is a strict provision that if they proceed on that theory they must at the same time "return to him his advancements on the said automobiles" which they never did. So either way we have it—if the contract violates the anti-trust laws of the United States, the cars are ours; if it does not violate them, they didn't tender or offer to return the advancements, and in either case they are out of court, and, as counsel has suggested, if their contract is valid we were lawfully in possession of these machines, even if they owned them—we had acquired

them lawfully and had a lien for 85% on advances, and they didn't extinguish that lien and didn't make a demand, and the rule is absolute when a person can replevin personal property, even though it belongs to another, demand must be made for the return or the action for replevin will not lie.

COURT: As I interpret this contract, for the purpose of this case it is immaterial whether these cars were held by the defendants under consignment or as a sale. In any event the contract provided that the Ford Motor Company might recover possession of them in case the contract was cancelled upon returning the advances, but before it could recover, it must return the advances or at least tender them, and the evidence in this case shows it did neither—it did not return the advances nor did it tender the money. All the evidence is Mr. Goden said he had the money in the bank but never offered to pay it—never gave the defendants any opportunity to accept it, but proceeded to institute this action without complying with their contract, and therefore I think as far as that feature of the case is concerned the defendants are entitled to a ruling instructing the jury to return a verdict in their favor for possession of this property.

And thereupon in furtherance of the above ruling so made by the court, the court instructed the jury as follows:

It is alleged in the complaint that the plaintiff elected to cancel the contract and did cancel it, and that it offered to return to the defendants the amount of money which they had advanced on the cars previously

ordered and demanded possession of the cars then on hand. The defendants admit making the contract. They deny, however, that the plaintiffs ever offered to return the money which they had advanced upon the cars, and thereupon claim that the plaintiff was not entitled to the possession of the cars at the time they brought this action, and that the action was therefore wrongfully brought, and by reason of that fact the defendants have been damaged in their business to the amount of \$25,000.00.

Now, the contract as entered into between the plaintiffs, The Ford Motor Company, and the defendants, as I said, was dated September 10, 1915. It expired by limitation on the 31st day of July, 1916, but it contained a provision that either party to the contract might revoke or cancel it at any time without cause—without giving any reason for it, and it appears in testimony that the Ford Motor Company, exercising the right given by this contract, did in fact cancel it by a telegram which it sent to the defendants, and by registered letter which was received by the defendants prior to the time this action was instituted. It also appears in testimony that at that time the defendants had in their possession some 37 cars which they had previously ordered from the plaintiff, upon which they had paid 85% of the list price, or all that they were expected or required to pay under the contract. The plaintiff company, upon the cancellation of this contract was entitled to a return of the cars which the defendants had on hand at the time, upon the payment or repayment to them of the amount of money which they had advanced or paid for the cars,

which is admitted by the parties to this case to be \$16,077.50, so that the plaintiff would have been entitled to the possession of these cars if it had paid to the defendants the \$16,077.50, but the evidence shows that it did not make such payment nor did it tender to the defendants this amount or any other amount on these cars, and therefore it was not entitled to the possession of the cars at the time this action was brought and inasmuch as it was not entitled to the possession the action was wrongfully brought and the defendants are entitled to a return of the cars, or their value in case a return cannot be had, so that in any event it will be your duty, under the law, to find a verdict in favor of the defendant to the effect that they are entitled to a return of these cars, or their value in case a return cannot be had.

To the action of the court in making the above ruling, and in giving the above instruction, and in directing the jury to find a verdict in favor of the defendants to the effect that they were entitled to a return of the cars, the plaintiff duly excepted upon the ground that under the pleadings in this case a demand was unnecessary and a tender of the money representing the value of the cars was unnecessary, and that there was sufficient evidence of such tender, which exception was duly allowed, and in support of the grounds of plaintiff's exception to the action of the trial court in so directing a verdict in favor of the defendants, the plaintiff hereto attached to this bill of exceptions a true and correct transcript of all the evidence taken upon the trial of the above entitled cause, duly certified to as such by the reporter taking the same, and hereby refers to such

transcript of evidence, and by such reference incorporates the same in this its bill of exceptions and makes the same a part of this its bill of exceptions, to the rulings of the court made in the above entitled cause.

In this relation it is hereby certified that there were in the hands of the court seventeen (17) written requests for instructions, which had been prepared and submitted to the court by the plaintiff prior to the arguments of counsel to the jury among which appeared the following:

IV.

I instruct you that the payment to defendants of advancements on said automobiles by defendants before taking possession of the same, by the plaintiff, was not necessary if the defendants informed plaintiff or led plaintiff to believe, they would not accept said payment.

VI.

I instruct you that the Limited Agency Contract between plaintiff and defendants Eugene Ford Auto Company, is a consignment contract and that by virtue of said contract plaintiff upon returning or offering to return the advancements made on the consigned automobiles in question, was entitled to the immediate possession of said automobiles.

VII.

In this case the plaintiff in addition to asking for the possession of said automobiles asks for \$1000.00

damages for the detention of the same. If you find from the evidence that plaintiff is entitled to the possession of the automobiles in question and has been damaged by their detention, then you should give plaintiff damages and may fix the damages in such an amount as you think will fairly compensate plaintiff for said detention, the amount, however, not to exceed \$1000.00.

To the refusal of the court to give said instructions the plaintiff excepted, which exception was allowed.

The instructions of the court to the jury, in full, follow:

Gentlemen of the Jury: The case to be submitted to you is an action brought by the Ford Motor Company against Winchell and Hathaway and others to recover possession of some thirty-seven automobiles. The plaintiff claims and alleges in its complaint that in September, 1915, it entered into a contract with Winchell and Hathaway, by the terms of which the latter should become the sales agents of the plaintiff company for the sale of its cars in certain designated territory, with their head office at Eugene. That the contract provided that it might be cancelled or revoked at any time by the plaintiff company without cause, and that in case it was so revoked that the plaintiff would be entitled to the possession or return to it of any cars thereunder which Winchell and Hathaway had on hand at the time, upon the payment to them of the money advanced by them on such cars.

It is alleged in the complaint that the plaintiff elected to cancel the contract and did cancel it, and that it offered to return to the defendants the amount of

money which they had advanced on the cars previously ordered and demanded possession of the cars then on hand. The defendants admit making the contract. They deny, however, that the plaintiffs ever offered to return the money which they had advanced upon the cars, and therefore claim that the plaintiff was not entitled to the possession of the cars at the time they brought this action, and that the action was therefore wrongfully brought, and by reason of that fact, the defendants have been damaged in their business to the amount of \$25,000.

Now, the contract as entered into between the plaintiff, The Ford Motor Company, and the defendants, as I said, was dated September 10, 1915. It expired by limitation on the 31st day of July, 1916, but it contained a provision that either party to the contract might revoke or cancel it at any time without cause—without giving any reason for it, and it appears in testimony that the Ford Motor Company exercising the right given by this contract, did in fact cancel it by a telegram which it sent to the defendants, and by registered letter which was received by the defendants prior to the time this action was instituted. It also appears in testimony that at that time the defendants had in their possession some 37 cars which they had previously ordered from the plaintiff, upon which they had paid 85% of the list price, or all that they were expected or required to pay under the contract. The plaintiff company, upon the cancellation of this contract was entitled to a return of the cars which the defendants had on hand at the time, upon the payment or repayment to them

of the amount of money which they had advanced or paid for the cars, which is admitted by the parties to this case to be \$16,077.50, so that the plaintiff would have been entitled to the possession of these cars if it had paid to the defendants the \$16,077.50, but the evidence shows that it did not make such payment nor did it tender to the defendants this amount or any other amount on these cars, and therefore it was not entitled to the possession of the cars at the time this action was brought, and inasmuch as it was not entitled to the possession the action was wrongfully brought and the defendants are entitled to a return of the cars, or their value in case a return cannot be had, so that in any event it will be your duty, under the law, to find a verdict in favor of the defendants to the effect that they are entitled to a return of these cars, or their value in case a return cannot be had.

So that the first question for you to determine will be what the value of these cars is. The plaintiff says that they are worth \$16,077.50. That is the amount the defendants paid for them. The defendants, on the other hand, claim and allege that the cars were worth \$18,555.25, which, I understand from the testimony to be the retail price of the cars, as specified in the contract between the parties.

Now, it is for you to determine from the testimony, in this case what was the reasonable value of these cars, and that amount must not be less than the sum admitted by the plaintiff, which is \$16,077.50, and it must not be more than the amounts claimed by the defendants,

which is \$18,555.25. So you will ascertain that amount and insert it in your verdict.

Then the next question will be whether or not the defendants are entitled to damages, from the plaintiff by reason of the fact that the plaintiff wrongfully took possession of these thirty-seven cars. The defendants allege that the effect of the plaintiff's action was to put them out of business—destroy their business—and that by reason of that fact they were damaged in the sum of \$25,000, and they are asking at the hands of this jury a verdict for the return of these cars and for damages they suffered or claim to have suffered on account of the wrongful act of the plaintiff in taking possession of the cars. That is a question of fact for you to determine from the testimony what damages if any the defendants suffered; what was the damage to the defendants' business by reason of the fact that the plaintiff wrongfully took from their business these thirty-seven cars.

Now, in arriving at a conclusion on that subject, it is proper for you to take into consideration the nature and character of the business in which these defendants were engaged at Eugene at the time these cars were taken and determine, if you can, what effect in dollars and cents the taking from them of these thirty-seven cars had upon that business. You should also keep in mind the fact that this contract between the plaintiff and the defendants would expire by limitation on the 31st of July, which was two months after these cars were taken, therefore, the defendants could not, under any circumstances, claim the right to act as the agent

of the Ford Company under this contract, or any contract, longer than the 31st of July, 1916, or two months after this transaction.

Again, in estimating the amount of damages to which the defendants are entitled, if any, you should bear in mind the fact that this contract had in fact been legally cancelled prior to the time the plaintiff took possession of these cars. As I said a moment ago, the contract provided that it might be revoked or cancelled at any time by either party without cause, and the Ford Motor Company had exercised its option and right under this contract and had cancelled it, so that it was at an end before they took possession of these cars, and therefore, at the time the cars were taken, the defendants were in the position of doing a garage business at Eugene without any contract with the Ford Company, and in possession of thirty-seven Ford cars, to which they were entitled. Now, the question is what was the damage to that business under these circumstances, caused by the plaintiff taking these thirty-seven cars wrongfully from the possession of the defendants.

Now the defendants claim and allege that their business was entirely destroyed. You have heard the testimony upon that question and it is for you to say whether or not the taking of these thirty-seven cars from their possession and the circumstances under which they were taken destroyed or injured their business, and if so, to what extent if you can arrive at that conclusion. They allege in their answer that their business was paying an income of \$300.00 a month and that they were

deprived of that income by reason of the wrongful acts of the plaintiff company.

Now, in estimating the damages you should keep in mind the amount that you allow as the value of these cars. The taking of the cars away from the defendants of course deprived them of the right to sell them and of any profits that they might have derived from the sales. That was one thing that of course was the result of this taking of the cars by the plaintiff company. Now, the profits on the sales would of course be a matter to be considered by the jury in arriving at your verdict in this case, but if you allow that on the value of the cars, that is if you find that the value of the cars is the amount that is claimed by the defendants, which is the wholesale price with the 15% added, or the profits that the defendants would have made if they had sold the cars, then you should not allow that same profit in estimating the damages. In other words, you should be careful not to allow the same time twice in the item of damages.

Now, the burden of proof is upon the defendants in this case to show by evidence which satisfies the jury, so that you can arrive at an intelligent and satisfactory verdict as to the amount they were damaged, if any, by this act of the plaintiff. It should not be based upon speculation nor conjecture but upon the facts and circumstances of the case, as disclosed by the testimony.

You are the judges, gentlemen, of all questions of fact in this case. You are the judges of the credibility of the witnesses, and it is for you to determine what weight is to be given to the testimony in this case and

what conclusions are to be derived therefrom. There was evidence during the trial tending to show that after this action had been begun the plaintiff company made a payment of some kind to the bank at Eugene, not very clear from the testimony what it was nor how it came to be made, but in any event it is wholly immaterial because the controversy here is over the right to the possession of these cars, and damages, if any, the defendants suffered by reason of the fact that the plaintiff wrongfully took them. The other question is not here for the consideration of the court and jury at this time, and need not enter into your deliberations.

There has also been something said during the trial about a deposit made by the defendants with the plaintiff company at the time this contract was entered into. The contract contains a provision to the effect that the defendants would deposit with the plaintiff company a certain sum of money necessary for certain liabilities and to secure certain liabilities. Now, that matter is not before the jury. There is no issue here in this case about that. There is nothing said in the pleadings about it, and there is no testimony here to show whether or not there is any offset against this \$800.00. And the same may be said on the question of bonus. There has been something said during the trial about the defendants having earned a bonus, and to which they are entitled, but that question is not in this record. There is no mention made of it in the pleadings and it is not an issue for consideration by this jury. The only question here is the right to the possession of these cars, and the damages, if any, which the defendants suffered by reason

of the wrongful taking of the cars from their possession by the plaintiff. The other questions, if there are questions between these parties, will have to be determined in some other proceedings and not in this replevin action.

The jury thereupon retired to consider their verdict and having returned into court with a verdict for the defendants, the plaintiff within the time provided for by rules of court, moved for time up to and including the 11th day of October, 1916, within which to file a motion for a new trial in the above entitled cause, and thereafter and on October 9th, 1916, upon motion for a further extension of time within which to file a petition for a new trial, the time to file a petition for a new trial was extended up to and including the 10th day of November, 1916, and thereupon and on the 8th day of November, 1916, and within the time allowed by order of court, the plaintiff filed its petition for a new trial and for a modification of the judgment in the above entitled cause of which petition the following is in words, letters and figures a copy, to wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

Ford Motor Company, a corporation,

Plaintiff,

vs.

E. A. Farrington, V. W. Winchell and

F. M. Hathaway, et al.,)

Defendants.

PETITION FOR NEW TRIAL OR MODIFICATION OF JUDGMENT.

Comes now the plaintiff in the above entitled action appearing by Messrs. Platt & Platt and E. L. McDougal, its attorneys of record, and petitions the court for a new trial in the above entitled action and for grounds of such petition alleges:

I.

That it appears from the undisputed testimony introduced upon the trial of the above entitled cause that the plaintiff was compelled to and did pay to The First National Bank of Eugene, Oregon, three notes of the defendants V. W. Winchell and F. M. Hathaway, aggregating the sum of \$12676.38, each of which notes was secured by a chattel mortgage on the automobiles sought to be recovered from the possession of the defendants in the above entitled action, which notes the plaintiff was compelled to pay and did pay in order to free the automobiles in controversy from the liens of the chattel mortgages given to secure said notes, in order to enable it to maintain an action for the replevin of said automobiles, and the court failed and refused to instruct the jury at the trial of the above entitled action that the plaintiff was entitled to off-set the amounts paid in satisfaction of said notes against any amounts which they might find in favor of the defendants and against the plaintiff.

II.

Plaintiff petitions for a new trial in the above entitled action upon the further ground that the verdict of the jury made and entered in the above entitled action and the judgment entered thereon contravenes the instructions given by the court upon the trial of the above entitled cause in that it allows to the defendants as damages profits on the sales of automobiles in addition to the value of the cars therein and thereby expressly fixed at the sum of \$16,077.50, and said judgment is contrary to the evidence introduced upon the trial of the above entitled cause in that it appears from the undisputed evidence introduced upon the trial of the above entitled cause and the law applicable to the facts proven as evidenced by the instructions of the court made upon the trial of the above entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above entitled action, and the defendants are not entitled to any damages arising from the action of the plaintiff in terminating its contract or in asserting its right to the possession of the automobiles in controversy, and that no evidence was introduced upon the trial of the above entitled cause upon which any claim for damages for the sum of \$6,000, or any sum in excess of \$2414.75 could properly be based, and said verdict and judgment are contrary to the evidence introduced upon the trial of the above entitled cause, and that it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the defendants, V. W. Winchell and F. M.

Hathaway, had sold their business to a third party at or about the time of the cancellation of their contract with the plaintiff in the above entitled cause and received for such transfer a valuable consideration.

III.

That the verdict rendered against the plaintiff in the above entitled cause is contrary to and against the weight of evidence introduced upon the trial of the above entitled cause.

IV.

Plaintiff further petitions the court for an order modifying the judgment entered in the above entitled cause on the 11th day of September, 1916, by off-setting against the sum of \$16,077.50, therein awarded to the defendants in lieu of the machines sought to be replevined in the above entitled action the sum of \$12676.38, being the amount of money paid by the plaintiff to The First National Bank of Eugene, Oregon, for the benefit of and in payment and discharge of the three notes of the defendants, V. W. Winchell and F. M. Hathaway, given to The First National Bank of Eugene, Oregon, as payee, each of which said notes were secured by a chattel mortgage upon the automobiles sought to be replevined in the above entitled action, which facts appear from the undisputed evidence introduced upon the trial of the above entitled cause, and for grounds of such petition alleges that the plaintiff was compelled to and did pay the said notes of the defend-

ants, V. W. Winchell and F. M. Hathaway, the first note being in the sum of \$2,800 bearing date April 22nd, 1916, the second note being in the sum of \$2.800 bearing date May 1st, 1916, and the third note being in the sum of \$8,400 bearing date May 24th, 1916, each of which notes was secured by a chattel mortgage upon the property sought to be replevined in the above entitled action, in order to free the property involved in the above entitled cause from the liens of said mortgages prior to the institution of its action for the replevin of said automobiles.

V.

Plaintiff further petitions for an order of this court modifying the judgment heretofore entered in the above entitled cause on the 11th day of September, 1916, by striking therefrom the sum of \$6,000 allowed to the defendants as damages on account of the alleged erroneous action of the plaintiff in taking possession of the automobiles involved in the above entitled controversy upon the grounds and for the reason that such is not a proper item of damage, because, it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above entitled action, and the defendants are, therefore, not entitled to any damages arising from the action of the plaintiff in asserting its rights to the possession of the automobiles in controversy and its termination of its contract with the defendants V. W. Win-

chell and F. M. Hathaway, and that no evidence was introduced upon the trial of the above entitled cause upon which any claim or judgment for damages in the sum of \$6,000 could properly be based, and that such allowance of \$6,000 for damages, or any other sum in excess of \$2414.75 is in contravention of the instructions of the court directing the jury that they should not allow the value of the machines in controversy and at the same time allow any claim for loss of profits arising from an inability to sell said automobiles, and upon the further grounds that it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the business of the defendants, V. W. Winchell and F. M. Hathaway, had been sold to a third party at or about the time of the cancellation of the said defendants' contract with the plaintiff in the above entitled action, and said defendants received therefor a valuable consideration.

PLATT & PLATT and

E. L. McDOUGAL,

Attorneys for Plaintiff."

which said petition for a new trial was, after argument by the respective counsel for plaintiff and defendants, and after due consideration by the Court, denied by the said Court on the 2nd day of January, 1917, to which ruling the plaintiff then and there excepted, which exception was allowed.

Copy of Transcript of Testimony attached to Bill of Exceptions.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Ford Motor Company,

Plaintiff,

vs.

Winchell & Hathaway,

Defendants.

Portland, Oregon, Tuesday, September 5, 1916, 10 a.m.

E. L. McDougal, for plaintiff.

I. N. Smith, L. Bilyeu, and Mr. Hardy, for defense.

R. S. BEAN, District Judge.

MR. McDOUGAL: An amended complaint was filed, and it was agreed between counsel for the defendants and myself that the answer to the first complaint should stand as the answer to the amended complaint, and the reply filed by the plaintiff to the defendants' answer should stand as the reply to the answer in the first instance.

In addition to that, there is a clerical error on page 3, line 2 of the amended complaint. I used the word, in the second line "property" when I meant to use the word "advancements," and I would ask the Court at this time for permission to strike out the word "property" and insert the word "advancement."

FREDERICK B. NORMAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. McDougal: Mr. Norman, what was your position with the Ford Motor Company on or

about the month of May and June, 1916?

A. Local manager for this territory.

Q. Your headquarters at what town?

A. Portland.

Q. As local manager, will you state whether or not the territory of Lane County, Oregon, was embraced in this district?

A. It was.

Q. Are you acquainted with Mr. Winchell and Mr. Hathaway, the defendants in this case?

A. I am.

Q. Will you state in what capacity, if any, they represented the Ford Motor Company at Eugene.

A. Agents.

Q. Here is a contract. Will you identify it and see if it is the signature of yourself.

A. Yes, sir.

Q. And Mr. Winchell and Mr. Hathaway.

Contract offered in evidence, received without objection and marked PLAINTIFF'S EXHIBIT 1.

PLAINTIFF'S EXHIBIT 1.

1915—LIMITED AGENCY CONTRACT—1916

THIS AGREEMENT, made at Highland Park, Michigan, this 10th day of September, 1915, by and between the Ford Motor Company, a Michigan corporation of Highland Park, Michigan, hereinafter known as the first party, and Eugene Ford Auto Co., of Eu-

gene, in the State of Oregon, hereinafter known as the second party, WITNESSETH:

WHEREAS the first party is the manufacturer of a line of automobiles known as Ford automobiles and also of automobile parts and accessories, and

WHEREAS the second party has applied to the first party to be the agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and first party is willing to appoint second party, with certain limited authority and upon the following terms and conditions only:

NOW, THEREFORE, this witnesseth:

APPOINTMENT AS LIMITED AGENT

(1) That first party hereby appoints second party its "Limited Agent" with certain authority as herein expressly stated only, for the purpose of negotiating sales of first party's product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

POWERS

(2) That second party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

AUTOS ON CONSIGNMENT

(3) That first party will consign its Ford automobiles to second party to be sold to users only, and

not for re-sale, upon bills of sale to be executed by the first party only, as hereinafter provided.

TERRITORY

(4) The second party shall arrange for sales of Ford automobiles only to residents of the following specified territory shown on the attached map, and to no other, namely:

The entire territory, including that of the Sub-Limited Agents, shall consist of the following, namely:

(4) All of Lane County except extreme Western portion of townships in R-10-W, R-11-W, and R-12-W; portion of Douglas County Tier, T-19-s in R-6-W to R-9-W; Tier T-20-S R-4-W to R-9-W; Tier T-21-S, R-4-W to R-9-W inclusive. Portion Lane County as follows: T-15-S R-9-W, T-16-S R-8-W, T-16-S R-9-W, Tier of (288 cars) T-15-S R-1-W and R-1-E to R-8-E; Tier T-16-S, R-1-W to R-3-W inclusive. Tier T-16-S R-1-E to R-8-E inclusive. Tier T-17-S R-1-W to R-9-W inclusive. Tier T-16-S R-1-E to R-8-E inclusive. Tier T-17-S R-1-W to R-9-W inclusive. Tier T-17-S R-1-E to R-8-E inclusive. Tier T-18-S R-5-W to R-9-W inclusive. Tier (170 cars) T-17-S R-1-E to R-8-E inclusive. Tier T-18-S R-5-W to R-9-W inclusive. Tier T-18-S R-1-E to R-7-E inclusive. Tier T-19-S R-1-E to R-7-E inclusive. T-19-S R-7-W north half of T-18-S R-1-and 2 W. Portion of Northern part of Douglas County, being townships lying north of Tier T-22-S within Ranges 4-W to 9-W, southern

part of Lane County lying south of Tier T-19-S; also Tier T-19-S in R-1-W to R-6-W inclusive. The southern half of T-18-S R-1-W and T-18-S in R-2-W, Tier T-15-S and Tier T-16-S in R-4-W to R-7-W inclusive, also the town of Springfield. (118 cars)

The retail territory, that is, the territory wherein second party arranges direct sales (and in which no Sub-Limited Agents are appointed) consists of the following, namely:.....

.....
.....
.....
The remainder of said entire territory shall be known as wholesale territory wherein shall be appointed Sub-Limited Agents as hereinafter provided, namely:.....

RESIDENCE DEFINED

In this connection, it shall be construed that a purchaser resides at either (a) his legal domicile; (b) the place where he sojourns for not less than three consecutive months; (c) his permanent place of business or occupation; or (d) either home where more than one is maintained. The decision of the first party in all violations of this sub-division shall be final and conclusive, with no recourse or appeal on the part of the second party.

DAMAGES FOR BREACH TERRITORIAL RESTRICTIONS

(5) The sales of Ford automobiles to residents outside of second party's own territory is a serious trespass upon the rights and earnings of other Limited Agents and Sub-Limited Agents, and tends to destroy the organization and business of the first party, and therefore, it is agreed that the territorial restrictions and limits set forth herein are of vital consequence to the first party and its business, as well as to the business of all other Limited Agents and Sub-Limited Agents, and therefore, for any and each violation of the same by the second party, second party hereby agrees to pay to the first party the sum of Two hundred fifty dollars (\$250.00) as and for liquidated damages. Said sum or sums may be deducted from any deposit he may have with the first party, or from any sums which first party may owe, for business done, to second party. First party may also cancel this contract for any such violation.

PRICES

(6) Second party shall arrange for sales of Ford automobiles to users at the first party's full advertised list prices only, current at date of sale, plus Fifty-three and 25/100 Dollars (\$53.25) for each automobile for freight charges and delivery expenses, plus the amount, if any, of any present or future United States tax or excise upon or in respect of each automobile or sale thereof. Wherever the words "List price" are used

herein they mean the latest retail selling price established or fixed by the first party.

SALES OF AUTOS FOR CASH ONLY

(7) Second party shall arrange all sales of Ford automobiles for cash only; but if second party should accept anything but cash payment on Ford automobiles, it must be upon his own responsibility and for his own account solely, and he must remit cash only to first party.

REBATES FORBIDDEN

(8) Second party will not render any services or supply any goods either gratis or at reduced prices, nor do or permit any act whatsoever either directly or indirectly, or through other parties, that would directly or indirectly have the effect of reducing the said current advertised list prices of Ford automobiles, plus freight and delivery charges, and said United States tax or excise, if any, and in the event of a breach or violation hereof, second party shall pay to the first party the sum of Two hundred fifty dollars (\$250.00) for every such breach or violation as and for liquidated damages arising to the first party and its business by reason of such breach or violation, or the same sum may be deducted from any moneys in first party's hands belonging to second party or which first party may owe, for business done, to second party. First party may also cancel this contract for any such violation.

CHANGES IN PRICES

(9) The first party may change the list prices of any of its products at any time it may choose, and second party shall conform to such changes immediately upon receiving notice thereof, and in case of increase or reduction in such list prices, first party shall not be bound to make any allowance to second party in cases of automobiles shipped before such changes take effect, and the second party's commission on automobiles as yet unsold by him shall be the difference between the eighty-five per cent (85%) advanced by him on such automobiles and the new selling price; provided, that in case of a reduction in price the first party will allow to second party a proportionate rebate on his advances made on such automobiles as still remain unsold in his possession at the date of such reduction as to automobiles shipped to the second party within thirty days immediately before such date, but none as to those shipped prior to such thirty day period.

ADVANCES

(10) Second party shall advance in cash to first party eighty-five per cent (85%) of the full advertised list price at the time of the consignment of its automobiles by first party to second party.

FREIGHT

(11) Second party shall pay the freight from Detroit or branch factory and advance freight, if any, as the case may be, to second party's place of business.

TITLE OF AUTOS

(12) First party shall retain all and complete title to each automobile until actual bill of sale, signed and executed by first party, has been delivered to the vendee, who shall be only a user; that is, one who has purchased for immediate use and not for re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and said United States tax or excise, if any, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever.

LIEN FOR ADVANCES—INSURANCE

(13) Second party shall have a lien on each Ford automobile for the eighty-five per cent (85%) advanced by him on the same and for freight paid by him on the same, and he shall keep and maintain insurance so as to protect himself against loss.

RETAIL BUYERS' ORDERS

(14) Second party shall take from each proposed purchaser of a Ford automobile and immediately forward to first party, a written order duly signed by him, upon the regular blank "Retail Buyer's Order," furnished by first party, without alterations or changes except the filling in of blanks, and second party will make

no arrangement for the sale of a Ford automobile without taking such written signed order.

DEPOSITS ON AUTOS

(15) All deposits of money, checks, etc., on Ford automobiles made by proposed buyers shall be remitted immediately when received with the Retail Buyer's Order to the first party, who shall be the custodian thereof, and first party will make proper disposition thereof when the transaction is closed according to the rights of all parties.

COMPANY MAY REJECT ORDERS

(16) The dealings of the second party with a proposed purchaser of an automobile or the taking of a signed order blank as herein required or a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order, but first party may wholly reject the same for any reason satisfactory to first party, and the proposed purchaser shall acquire no rights whatever in the automobile until delivery of the duly executed bill of sale as herein provided.

WEEKLY REPORTS OF BUSINESS

(17) The second party shall report each week to first party all Ford automobiles contracted for by him with purchasers under this agreement, including all sales by Sub-Limited Agents and their purchasers, giving

motor number and description of each automobile sold or contracted for, the date of sale and full name and address of each purchaser.

WARRANTY

(18) Second party shall have no authority to make any warranty whatsoever of Ford automobiles, but the purchaser shall be referred to the provisions of the Retail Buyer's Order and Bill of Sale in that behalf. Second party shall have no authority to make any warranty representing first party, of any parts or accessories. The current printed literature issued by the first party will contain the only warranties of parts or accessories made by first party.

REPRESENTATIONS

(19) The second party shall make no representations as to Ford automobiles or parts or accessories, except the same as are set forth in the printed literature issued by the first party. If second party violates these provisions he may be personally liable, but shall not in any wise bind the first party.

CLAIMS AGAINST CARRIERS

(20) In case of damage to automobiles by carriers in transit to second party, collection from the carrier shall be made in the name of the first party as the owner of such automobiles—but as between the parties hereto, the second party shall be entitled to eighty-five per cent

(85%) of the amounts realized, less the like proportion of expenses of collection, or the first party may, at its option, assign to second party all its claims in such matter, whereupon second party shall present and prosecute his own claim without any liability of the first party, and it is stipulated that first party shall not be liable to the second party for any injury or damage to the automobile after it is once delivered to the carrier or for any return of the advances thereon.

KEEP PLACE OF BUSINESS

(21) That second party will maintain on his own account and at his own expense, a place of business and properly equipped repair shop prominently located in Eugene for the purpose of conducting such Limited Agency business, and shall employ competent and efficient salesmen, and first party shall not in any wise be responsible for the charges connected with such place of business, nor shall second party have any authority to render first party responsible for the rent, taxes, wages, or other charges or liabilities of any nature whatsoever arising out of such business or in connection with such place of business.

THEFT OR DAMAGE TO AUTOS. WILL SELL ALL AUTOS. CLAIMS BY THIRD PERSONS

(22) Second party shall safely keep and he hereby agrees to save first party harmless against them for dam-

age of any kind to said Ford automobiles while in his possession under consignment, and in consideration of his being granted this agency, he expressly agrees that he will bear all damages or injury arising from theft, accident, injury or other cause to said automobiles so consigned to him while in his possession, or while in transit from first party to second party. Inasmuch as first party bases its output and expenditures upon the orders given by its Limited and Sub-Limited Agents, therefore, and in consideration of this contract the second party hereby agrees to arrange sales under the terms of this contract and by and in accordance with the methods herein provided, of all the automobiles consigned and delivered to him pursuant to his orders for the same, and first party shall not be liable to return to second party his advances on same. The second party also agrees to save first party harmless against any and all claims made against first party by any person or persons not parties hereto for damages arising out of the conduct of second party's said business or Limited Agency whether from accident or injury or collision or loading or unloading or driving or theft or fire or from any cause of any and every nature whatsoever.

TAXES

(23) The second party shall, as a part of the expenses of his business, pay any taxes that may be levied upon or against or on account of such business or his stock, or of any of such automobiles as may be in his possession or in transit on bill of lading, or otherwise, for delivery to him.

SIGNS, ADVERTISEMENTS

(24) The second party agrees to conspicuously display signs on and in his building and windows, designating that he is the "Limited Agent for Ford cars" for the territory specified herein and he shall advertise the first party's product effectively in the local papers and give his immediate and careful attention to all inquiries, and give good representation to all interests of first party in the territory aforesaid. Second party agrees not to advertise or trade in the first party's product in such a way as to be an annoyance or injurious to first party or any of its duly appointed Limited Agents or Sub-Limited Agents, and that he will not repeat any such advertisements or publish any form of advertising containing matter to which the first party has objected, and that he will follow as closely as possible the advertising copy provided from time to time by the first party. When agency of second party is cancelled or terminated he agrees to remove all such signs and cease such advertising.

REPAIRS, NUMBER PLATES, ETC.

(25) Second party agrees that he will make repairs on all Ford automobiles in his territory, or coming into his territory, whether sold through him or not, and to perform this work promptly and in workmanlike manner, and that he will not remove or alter the first party's patent plate, motor number, or other numbers or marks affixed to any Ford automobile, or suffer the same to

be done, and that he will not materially change any automobile consigned to him by the first party.

DEMONSTRATOR

(26) Second party agrees to purchase from first party for himself and keep in use at all times at least one Ford automobile of the current year's model, for the sole purpose of demonstration and exhibition to intending purchasers and to maintain same in proper running condition and good, clean order and repair at all times. If he sells said automobile before the same has been in actual use three months, second party agrees that he will sell the same at the full advertised list price only, and within his own territory only, as provided in sub-divisions four, six and eight hereof. For any breach of this provision the second party shall pay to first party Two hundred fifty dollars (\$250.00) as reasonable liquidated damages. The only warranty of such demonstrating or service cars by the first party is agreed to be the same as that given by first party on automobiles sold to the general public and which is printed on the Retail Buyer's Order.

PATENTS

(27) First party owns, and the Ford automobiles are manufactured under, and embody the following letters patent of the United States or some of them, namely:

United States letters patent No. 747,909 issued December 22, 1903.

United States letters patent No. 773,934 issued November 1, 1904.

United States letters patent No. 787,908 issued April 25, 1905.

United States letters patent No. 847,405 issued March 19, 1907.

United States letters patent No. 879,757 issued February 18, 1908.

United States letters patent No. 1,005,186 issued October 10, 1911.

United States letters patent No. 1,012,620 issued December 26, 1911.

United States letters patent No. 1,044,038 issued November 12, 1912.

United States letters patent No. 1,066,729 issued July 8, 1913.

United States letters patent No. 1,073,569 issued September 16, 1913.

United States letters patent No. 1,075,557 issued October 14, 1913.

United States letters patent No. 1,078,042 issued November 11, 1913.

United States letters patent No. 1,098,361 issued May 26, 1914.

and of applications for letters patent now pending and undetermined. First party further owns, and Ford automobiles, parts and accessories are manufactured and sold under and embody the exclusive right to the use of

the name "FORD" acquired by and through United States copyright and trademark registration numbers 74,530, issued July 20th, 1909 (script word "FORD"), and 98,655, issued July 28th, 1914 (winged pyramid design), together with the rights acquired and established thereto by and through fair trade and trade user. The validity of each of said patents and of the said copyright, registration and trade user rights, and of the claims of the first party under said applications is hereby expressly admitted; and it is agreed that the sale and use of said automobiles as delivered to the second party are restricted according to the terms of this agreement of agency, and that no license to handle or use said automobiles under such patents and applications, except strictly in accordance with the terms and conditions of this contract, is given; that second party's right to handle and deliver said automobiles embodying said patents and inventions, is restricted and limited by this contract in its terms, and that no person shall acquire the right to use said automobiles or to own the same if there be any violation of the territorial or price restrictions set forth herein; and any such violation shall constitute an infringement of each and every of said patents, applications and inventions.

COMMISSIONS

(28) As second party's commission for making such sales of Ford automobiles, first party will, after payment by the purchaser, allow to second party (except in the cases specified in sub-division nine hereof)

fifteen per cent (15%) of such full advertised list price, and will allow to second party such freight and delivery charges, and United States tax or excise, if any, as aforesaid.

ADDITIONAL COMMISSIONS

(29) First party agrees to allow and pay to second party the following additional commissions on the net amount of business he shall do hereunder during the term of this agreement, upon Ford automobiles, but not on Ford parts, repairs or accessories, namely: No added commissions whatever when his said business shall total less than \$5,000.00, but when the second party shall have done such business (not including freight charges and not including his fifteen per cent (15%) commission) to the amount of \$5,000.00, his right to additional commissions shall begin, and he shall be entitled to such added commissions as follows: On all such business totaling less than \$10,000.00, one per cent (1%); if \$10,000.00 and less than \$20,000.00, two per cent (2%) on all such business; if \$20,000.00 and less than \$35,000.00, three per cent (3%) on all such business; if \$35,000.00 and less than \$50,000.00, four per cent (4%) on all such business; if \$50,000.00 or more, five per cent (5%) on all such business. That is, for illustration, if he shall have done \$7,000.00 total business as above described, his commission shall be one per cent (1%) on all of such \$7,000.00. If, for illustration, his total business as above described shall be \$34,900.00, his commission shall be three per cent (3%) on all of such \$34,900.00. If \$49,-

900.00, then four per cent (4%) upon all of such \$49,900.00; if it shall total \$50,000.00, then five per cent (5%) on all of such \$50,000.00, and likewise five per cent (5%) upon all such business over \$50,000.00.

If any payments shall have been made to second party during the year on the one per cent (1%) basis or any lower basis than he shall finally be entitled to, such payments shall be credited on the final amount owing him and shall be deducted when he becomes entitled to and shall receive the higher percentages.

PAYMENTS TO SUB-LIMITED AGENTS SECURED

(30) It is agreed that such added commissions shall not be paid to second party until the second party shall have furnished satisfactory evidence to first party that all commissions and added commissions due or owing or which may later become due or owing the Sub-Limited Agents under the second party have been fully paid, or until satisfactory arrangements are made with the first party to insure Sub-Limited Agents being paid the commissions and added commissions which may be due or become due to them under their respective contracts.

COMPANY MAY SELL DIRECT

(31) First party hereby expressly reserves to itself the right to make direct sales to customers in the territory above described, and in such case will pay one (and only one) commission of five per cent (5%) of the list price of

the automobile or automobiles so sold, after it shall have received the full purchase price in cash, to the second party, or if there shall be a Sub-Limited Agent in that special territory and locality where such sale is made, then such five per cent (5%) shall be paid to such Sub-Limited Agent. This provision shall not apply to sales of parts or accessories, which are otherwise provided for herein, nor shall it apply to sales to or through Sub-Limited Agents, but only to those made by first party directly to purchasers domiciled or residing in said territory within the meaning of Sec. 4 of this agreement. First party shall not pay any commission to second party or his Sub-Limited Agents on any sales to residents outside second party's territory, even though delivery should be made within said territory to residents of such other territory.

STOCK OF FORD PARTS

(32) Second party agrees that he will purchase from the first party on his own account and carry on hand at second party's place of business aforesaid, a stock of Ford parts that will inventory at all times during the term of this agency contract, not less than Two Thousand Dollars (\$2000.00) at the list price, and first party shall have the right to send its representative to inventory such stock of Ford parts as second party may have on hand, at any time during the term of this contract. First party may cancel this contract for any breach of this provision. Inasmuch as the reputation of Ford cars is often injured by the use therein of inferior

parts not made or furnished by the Ford Motor Company, therefore, the second party also hereby agrees that all his purchases of parts for Ford automobiles shall be made, as to all parts listed in its parts catalogue, exclusively from the first party, and that he will not use, sell or recommend to Ford owners similar parts manufactured by others.

DISCOUNT ON PARTS

(33) First party agrees to allow the second party a discount of twenty-five per cent (25%) on all parts of Ford automobiles listed in the Ford parts price lists, excepting on bodies, on which the discount shall be fifteen per cent (15%) only. These discounts are allowed in consideration of second party's agreement to carry stock as provided in sub-division thirty-two above, and in consideration of the other provisions of this contract.

First party agrees to allow second party an additional discount of ten per cent (10%) on all Ford parts sold by second party at wholesale to Sub-Limited Agents under him; said additional ten per cent (10%) to be credited by first party monthly on receipt by it of certified itemized statement of such sales and deliveries made during the previous month by the second party.

RETURN OF PARTS

(34) The second party shall have the right and privilege of returning to first party at the place of purchase at any time during the term of this contract, or

within thirty days after its cancellation or expiration, but at his own expense, for credit at the purchase price, all such new parts of first party's automobiles as he may desire, except bodies, tops, tires, lamps, generators, speedometers, windshields, and other equipment known in the trade as "accessories" provided same are in as good condition as when sold by the first party to the second party.

COMPANY MAY SELL PARTS

(35) First party reserves the right and privilege to sell and deliver or cause to be sold and delivered any parts of Ford automobiles, repairs, accessories or other goods that may be ordered from it by any person or persons within the territory covered by this agreement, without the payment of any profit or allowance or any discount or credit whatever to the second party upon such sales. It is expected and intended that second party will carry the stock of Ford parts, repairs and accessories as herein provided, and that nearly all orders for such parts, repairs and accessories will be placed with him by all persons in the above described territory.

CLAIMS

(36) It is further agreed that no claims regarding errors in shipments or billings are to be recognized by first party, unless received in writing by it from the second party within ten days after receipt of the goods by the second party.

CRATING, ETC. EXTRA

(37) The first party will be entitled to receive an extra charge for crating, packing, double decking and loading, which the second party shall stand and pay as a part of the expenses of conducting his business.

DELAYS IN SHIPMENTS

(38) The first party shall not be liable in any way for delayed shipments of any goods ordered or on account of shipments by any other than a specified route.

PAYMENTS AT HOME OR BRANCH OFFICE

(39) The second party agrees to take up all sight drafts with exchange drawn on him by the first party for automobile consignments or for shipments of parts, when shipments arrive or when sight drafts are presented, the intent hereof being that payments are to be made to the first party at its home or branch office, but if it elects to draw drafts, the same will be honored with exchange by second party.

DEPOSITS

(40) As a guarantee of the full and faithful performance by the second party of all the terms and conditions of this agreement, the second party has deposited with the first party the sum of Eight Hundred Dollars (\$800.00) in cash, and it is agreed that the first party

may, at is option, apply any part or all of said amount towards the liquidation of any past due accounts owing by second party to first party, or any other legitimate claims arising from the second party's failing to perform the obligations of this agreement, and the balance of said contract deposit, if any, shall be returned to the second party at the termination of this agreement and the fulfillment of all its requirements. In case of cancellation or termination of this contract as herein provided, such deposit balance on hand may be retained by first party as security for and until the fulfillment of all provisions hereof as to the winding up of the business of the agency and final disposition of all unsold cars as stipulated herein. Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party.

ESTIMATE OF AUTOS REQUIRED

(41) In order that first party may determine the prospective requirements of its business for the business year ending July 31, 1916, and may base its contracts for materials, etc., thereon, the second party agrees that he will require consignments of not less than 288 Ford automobiles for his said entire territory between the date hereof and July 31, 1916, to be shipped in the various months as per the following schedule, and he hereby makes requisition for such automobiles to be shipped as stated, namely:

For his wholesale and retail territory respectively, as follows:

In August, 1915, Wholesale Territory.....	22	Autos
In August, 1915, Retail Territory.....	8	Autos
In September, 1915, Wholesale Territory....	16	Autos
In September, 1915, Retail Territory.....	24	Autos
In October, 1915, Wholesale Territory.....	2	Autos
In October, 1915, Retail Territory.....	24	Autos
In November, 1915, Wholesale Territory....	0	Autos
In November, 1915, Retail Territory.....	8	Autos
In December, 1915, Wholesale Territory....	0	Autos
In December, 1915, Retail Territory.....	8	Autos
In January, 1916, Wholesale Territory.....	18	Autos
In January, 1916, Retail Territory.....	16	Autos
In February, 1916, Wholesale Territory....	0	Autos
In February, 1916, Retail Territory.....	8	Autos
In March, 1916, Wholesale Territory.....	2	Autos
In March, 1916, Retail Territory.....	38	Autos
In April, 1916, Wholesale Territory.....	24	Autos
In April, 1916, Retail Territory.....	24	Autos
In May, 1916, Wholesale Territory.....	8	Autos
In May, 1916, Retail Territory.....	16	Autos
In June, 1916, Retail Territory.....	6	Autos
In June, 1916, Wholesale Territory.....	8	Autos
In July, 1916, Wholesale Territory.....	8	Autos
In July, 1916, Retail Territory.....	0	Autos

REQUISITIONS MAY BE DECLINED

(42) First party agrees that the foregoing requisitions of the second party will receive first party's careful and good faith attention, but first party does not agree absolutely to fill them, but expressly reserves the right

to refuse them from time to time, or such parts of them as the first party deems necessary or proper, and all such requisitions are subject to delays occurring from any cause whatsoever in the manufacture and delivery of its product—no legal liability to fill such requisition being incurred under any circumstances. And the second party may cancel, upon one month's full written notice to first party, the said requisitions, or what remains unfilled thereof.

PRICE MAY BE CHANGED

(43) It is further agreed that the foregoing requisitions for consignments of Ford automobiles are given by second party and received by first party subject to the express condition that prices are subject to be changed by the first party at any time during the year and deposits are so accepted; in the event of changes, however, the second party may cancel such remaining requisitions, and may demand and receive back from the first party such deposits as may have previously been made, less any amounts for which second party may be obligated or owing either directly or indirectly to the first party.

SUB-AGENCIES

(44) Second party shall appoint a Sub-Limited Agent or establish a properly equipped branch or garage for the sale and repair of Ford automobiles in every such city or town within the above described territory as shall at any time or from time to time be designated by

first party, in order that first party shall have adequate representation therein, and so that the public shall have at hand facilities for purchasing Ford automobiles, parts, repairs, accessories and supplies, and if second party fails to secure such Sub-Limited Agents, or establish branches as herein provided, then first party may do so, or first party may take such territory entirely away from second party, or first party may sell direct its automobiles, parts, accessories, etc., in such unoccupied territory, in any of which cases the second party shall not claim or be entitled to any commissions on business so handled.

SUB-LIMITED AGENTS' COMMISSIONS SUB-LIMITED AGENTS' CONTRACTS

(45) The second party shall allow and pay the Sub-Limited Agents the regular Limited Agent's commissions on the net volume of business done, and will require each Sub-Limited Agent to execute the Sub-Limited Agent's agreement provided in blank by first party in triplicate, and shall within three days after the execution thereof transmit in triplicate said agreement, properly executed, to first party for its approval and signature, and upon being executed by the first party, one copy each shall be delivered and kept by the first party and second party hereto and said Sub-Limited Agent. No arrangement or agreement made by second party with any Sub-Limited Agents shall be in any manner binding upon the first party until it shall have been reduced in writing on such blank aforesaid and ap-

proved and signed in triplicate by first party's duly authorized executive officer and delivered as aforesaid, and second party further agrees not to enter into any private arrangement or agreement with any party or parties to act as his Sub-Limited Agent except as herein provided. All Ford automobiles sold by first party through the Sub-Limited Agents of the second party, appointed and authorized as aforesaid, shall be considered as taken by the second party as a portion of the Ford automobiles handled by him under this contract.

DEPOSITS OF SUB-LIMITED AGENTS

(46) The first party shall be custodian of all contract deposits made by the Sub-Limited Agents and of all deposits made by proposed buyers, and in the event of the termination or cancellation of this contract, second party shall have no claim whatsoever directly or indirectly against first party, for such deposit moneys, whether such deposits are made through the second party or directly by the Sub-Limited Agents or buyers themselves. When deposit moneys are transmitted to the first party by the second party, second party shall specify whose money the same is, and on what particular contract or Retail Buyer's Order such deposit is being made.

NO ASSIGNMENT

(47) The second party shall have no right to assign this contract, or any interest in the same, without the written consent of the first party.

CANCELLATION

(48) This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect.

SALE OF AUTOS ON HAND AT TIME OF TERMINATION

(49) In case of the cancellation or expiration of this contract the first party may at its option retake possession of all such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided however, if, after reasonable effort on the part of second party to make such sale there shall remain on

hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent '(10%) additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.

PERFORMANCE OF SUB-LIMITED AGENCY CONTRACTS

(50) In case of cancellation of this contract first party will carry out all such contracts made with Sub-Limited Agents under the second party, as were made with the approval of the first party as herein provided, the intent being that the first party shall take the same off the hands of second party.

TERMINATION

(51) Upon termination of this contract, whether by expiration or cancellation, all liability on the part of the first party, shall, except as to matters pending at the date of such termination, cease and determine, and the second party shall have no claim to commission, rebate or damage, notwithstanding transactions may thereafter take place with or sales be made to parties with whom the second party shall have dealt during the currency of this contract

NO WAIVER OF THESE PROVISIONS

(52) The failure of the first party to enforce at any time any of the provisions of this contract, or to exercise any option which is herein provided, or to require at any time performance by the second party of any of the provisions hereof, shall in no way be construed to be a waiver of such provisions, nor in any way to affect the validity of this contract or any part thereof, or the right of the first party to thereafter enforce each and every such provision.

MICHIGAN CONTRACT

(53) This contract, it is agreed, is a Michigan contract and shall be construed as such.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

Signature of the First Party

FORD MOTOR COMPANY,

By *W. A. Ryan-A.* (L. s.)

Manager of Sales.

Approved *F. B. Norman,*

Branch Manager.

O. K.'d *J. S. Beckhardt,*

Accounting.

Ckd. and App. *E. W.,*

Sales.

Signature of the Second part

Eugene Ford Auto Co. (L. s.)

By F. M. Hathaway (L. s.)

Witness *Chas. E. Godon,*

First National Bank.

(Name of Limited Agents Bank)

Trial balance, July 31, 1915.

C. R., Aug. 13, 1915, page 15.

C. R., Sep. 9, page 40.

MR. McDOUGAL: I also desire to offer in evidence letter dated May 25, 1916, signed Ford Motor Company, F. B. Norman, manager, admitted to have been received by the Eugene Ford Auto Company, at Eugene, Oregon, through registered mail.

Marked PLAINTIFF'S EXHIBIT 2.

Portland, May 25th, 1916.

Eugene Ford Auto Company,

Eugene, Oregon.

Gentlemen: In accordance with the provisions of Sub-divisions 46 and 47 of your contract, notice is hereby given of the cancellation of your Limited Agency Contract with the Ford Motor Company, effective as of this date.

In this connection, attention is called to Sub-division 47 of the contract relating to the winding up of the

affairs of the Limited Agency in the event of the cancellation of the contract. Ford Motor Company,
F. B. Norman, Manager.

CROSS EXAMINATION

Questions by Mr. Hardy: Did you not send a telegram previous to sending the letter?

A. Yes, sir.

Q. A telegram stating—

MR. McDOUGAL: If the Court please, I object. The telegram is the best evidence.

Q. Have you the original of that telegram?

A. I have not.

Q. Did you keep an office copy?

A. Yes, I imagine so.

Q. Can you produce it?

A. I don't know. I think so.

Q. I would like to have you produce it, if you please.

A. Yes.

MR. McDOUGAL: We will produce it if we can find it.

Witness excused.

CHARLES E. GODEN, witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. McDougal: Now, Mr. Goden, in what capacity were you employed by the Ford Motor Company during the months of May and June, 1916?

A. Territory representative.

Q. Are you acquainted with the defendants, Mr. Winchell and Mr. Hathaway, in this case?

A. I am.

Q. Were you down to see Messrs. Winchell and Hathaway prior to the time that this registered letter was mailed to them by Mr. Norman?

A. Any date prior, you mean?

Q. I will just withdraw that question. Were you down to Eugene to interview Messrs. Winchell and Hathaway subsequent to May 25th, the date upon which this registered letter was mailed to Winchell and Hathaway, cancelling their contract?

A. About that date, yes, sir.

Q. For what purpose did you go down there?

A. Instructions from the Ford Motor Company, my manager, Mr. Norman, to go there and displace them as agents, and place Vick Brothers in that territory.

Q. What did you do when you first went down there?

A. Well, I got in there—went to Hathaway and Winchell's office or place of business, the Eugene Ford Auto Company, and told them that I had been sent there for that purpose, cancelling the contract, and they received the registered letter at the time I was in their office. I said "That is your notification of cancellation,

which is according to the rules of the contract.” They said “Yes, we understand that; we expected it.”

Q. Now, Mr. Goden, do you recall how many Ford automobiles had been consigned to and were in possession of Winchell and Hathaway at the time they received this registered letter?

A. Thirty-six or seven; thirty-seven, I believe.

MR. McDOUGAL: I think it will be admitted, will it not, Mr. Smith, that the automobiles in the possession of the defendants at the time were the ones that are named in paragraph 6, page 2, of Plaintiff's Amended Complaint?

MR. SMITH: We will admit the identical automobiles numbered in the complaint, that is giving the factory number of the automobiles, were in our possession at the time of the commencement of the action.

COURT: Thirty-seven of them.

MR. SMITH: We have set up the same numbers on page 3 of our Answer, lines 26 to 31.

MR. HARDY: Thirty-six touring cars and one Sedan.

Q. Do you recall, Mr. Goden, the price of these cars, touring cars, F.O.B. Detroit?

A. Touring cars?

Q. Yes.

A. F.O.B. Detroit, \$440.00 at that time.

Q. At what price were they consigned to the defendants, Messrs. Winchell and Hathaway?

A. Eighty-five per cent of the retail price.

Q. Eighty-five per cent?

A. \$374.00.

Q. In addition to that did the defendants have to advance the freight and the—

A. He was supposed to pay the freight and 85% of the cost.

Q. What would that freight and the cost of assembling amount to?

A. Well, there is an allowance in the freight of four dollars for unloading, which makes the freight at that time—the retail price of the car at Eugene should have been \$493.25; \$53.25 was the freight, with the allowance for unloading the actual freight cost is \$49.25.

Q. Then the price as I understand it—the retail price to the public of a car at Eugene would be \$493.25?

A. Yes, sir.

Q. That would be the touring car?

A. Yes.

Q. And the price at which the car was consigned to the agent was 85% of that, or \$427.25.

A. Well, it was \$374.00 plus the \$49.25—

Q. And the cost of assembling?

A. '(Continuing) and this four dollar allowance for assembling.

Q. That would make \$427.25. Now, they had automobiles on hand, as stated in the complaint, to the value of \$16,077.50. What does that represent, the value of the automobiles, or rather the amount of the advancements on the automobiles by the defendants, Winchell and Hathaway?

A. It represents the cost of the automobiles to the defendants, that is the actual amount of money involved

by them at Eugene. It was on consignment account that they were put in.

Q. When you were in the office there and this registered letter was received, you said that the defendants said they expected to receive a cancellation of the contract. What further acts did you do then?

A. Why, immediately following that? Oh, I talked with the defendants, Mr. Hathaway and Mr. Winchell, in regard to the thing, that is settlement on the proposition. As I had been handling Mr. Hathaway and Mr. Winchell in the territory for some time and we had always been on very friendly relations, why we just talked the matter over, and the settlement proposition—what they were going to do about it. Well, they said they had not decided, had taken it up with an attorney. I said, “All right, if you have got this matter in the hands of your attorney, I will have to report that to the company.” I said, “I don’t know, between you and I, whether it is a proposition to take up with attorneys. Sometimes we can settle better out of it. However, if you want to go ahead with that.” And I called their attention to the clause in the contract which provided for this cancellation, and also the proviso of taking the cars back, and they said, “Where is that clause,” Mr. Winchell said. I told him and showed it to him, and he took a copy of the contract and invited me to go to the attorney’s office, and I said “No.,” I will not go to your attorney’s office. I have nothing to do with attorneys. When I go to your attorney’s office, my attorney will be with me,” and he went off with the contract.

Q. Could you find the clause of the contract that you read to them?

A. If I remember, it is 43.

Q. Just take Exhibit 1, and see if you can find the clause in the contract.

A. I think it is in 22 here—yes, it is in paragraph 49 of this contract, “Sale of Autos on hand at Time of Termination.” That is the clause.

Q. All right, just read that to the jury.

A. “49. In case of the cancellation or expiration of this contract the first party may at its option retake possession of all of such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration, at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided, however, if, after reasonable effort on the part of second party to make such sale there shall remain on hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent (10%) additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.” That went along to the fact—I took this clause along to show

them they didn't have them sold until the ten per cent provided in this—

MR. SMITH: That is a point for Your Honor to decide.

A. I was just telling what I said to them.

COURT: Let him tell what he said to them.

A. Said to them at the time.

Q. Now, Mr. Goden, referring to this paragraph 49 again, which you have just read to the jury, will you state whether or not anything was said about the advancements that had been made upon these automobiles by the defendants Winchell and Hathaway?

A. At that time?

Q. Yes.

A. No, they just took that—went off to his attorney's at that time with the thing in his hand.

Q. Do you recall whether this was May 26th or what date this was?

A. No, it was around that. That date could be proved by—

Q. The letter was written May 25th and I assume—

A. I got there that time. I was in the office when it arrived, so it must have been about the 26th. My traveling expense account in the office would show the exact date I arrived.

Q. What did you do then after that with reference to closing up this contract?

A. I believe I met Vick Brothers there at the train after that.

Q. When did you next meet Winchell and Hathaway?

A. Oh, I think I saw them off and on on the street. I took some matters up with the company over the phone and—I can't remember now just exactly when I next met them. Oh! I think I met them next with Vick Brothers at their place of business, if I remember right.

Q. And who are Vick Brothers?

A. Well, Mr. Vick was there. Vick Brothers are the present agents at Salem, Oregon.

Q. Will you state whether or not at any time subsequent to May 26th you ever made any tender of the advancements on these machines by Winchell and Hathaway.

A. Before May 26th?

Q. Subsequent to May 26th.

A. Oh! yes, the company forwarded to the bank in Eugene telegram to honor my draft in payment of the \$16,077, I believe, and some odd cents—I forget just exactly the figures—in payment of a check payable to Hathaway and Winchell for automobiles, and the bank was to notify me that the check was there—the money was there at my disposal but only for that purpose—could only sign a check for return to them—for Hathaway and Winchell. The telegram specified that was the only use I could make of this money.

Q. You say you had this \$16,077.50 in the bank there at Eugene?

A. A telegram authorized the draft and the bank notified—I saw the banker and he said it was there, and that I could sign it for that purpose.

Q. Will you state whether or not you made any

effort to get this money and give it to Winchell and Hathaway.

A. Yes, I attempted to get Winchell and Hathaway, if I remember right, on the day I had the money in the bank to use, but I believe one was in Portland, or some delay, I couldn't see them until evening. I at first demurred and thought I would take it up the next morning; they said "Well, we will meet you." I said "All right, you can come to the hotel then." And they closed their place of business at six o'clock and I was at the hotel. I said "Come on up to my room, and we will talk the matter over," and Mr. Vick—yes, I believe Mr. Vick was with me. So when he got to the hotel, Mr. Hardy was with him, their attorney. They said "This is Mr. Hardy" in the lobby, and we all walked up to the room, and I said "Now, I have the money in the bank to pay you for those automobiles you have in your possession" and Mr. Winchell said "You mean cash" and I said "Yes, I have got the cash." He says "I won't do anything without I get cash from the Ford Motor Company." I said "All right, the cash is in the bank. I can't get it tonight, but will get it in the morning." He says, "You mean you can get it in the morning? It is there?" I said "Yes, it is there." I said "Are you willing to accept that?" And their attorney spoke up in the conversation, and I said "I don't recognize you. I am not talking to their attorney. I asked to talk to Mr. Winchell and Mr. Hathaway, and I don't recognize you at all in this." He says, "I am their attorney." I says "That don't make any difference, and I didn't ask you to the room." With that he started to walk out, and he says

"We will take it under advisement," and I said "No advisement in this case."

Q. Was there anything said there at that time by Mr. Hardy or any one else with reference to whether or not they understood this to be a tender?

A. Yes, I took it up with that action, that I was tendering them the money.

MR. SMITH: We move to strike out that answer, and ask to have him answer the question.

COURT: State what was said about it.

Q. (Read as follows: Was there anything said there at that time by Mr. Hardy or anyone else with reference to whether or not they understood this to be a tender?) Just answer that question.

Q. By any one else?

Q. (Read.)

A. Yes.

Q. Who said that? Who made the statement?

A. I made the statement to Vick Brothers at the time that we were going to tender them this money. We went up there. I told them to come up as a witness I was tendering this money.

Q. Well, was anything said by Mr. Hardy—

MR. SMITH: I move to strike that out; that is not responsive to the question—what he said to Vick Brothers, outside the presence of these defendants, has nothing to do with this case.

COURT: State what you said to the defendants.

A. I said "I am here for the purpose of making a tender to you of this money for these automobiles, according to the contract." And then he spoke up and

said "Well, we will take that under advisement."

Q. Did you the next day make any attempt in any way to tender this money again?

A. Not excepting meeting, I believe it was Mr. Winchell on the street, and telling him the money was ready for them if they wanted it.

Q. Was anything said by you, or any invitation extended to them to come to the bank?

A. I told them that their banker had received a telegram to that effect, that it was there. It was their same banker, you see, that got the notice.

Q. You never took this sixteen thousand out of the bank?

A. No, I didn't want to carry this around with me at night. I didn't have no use for it. I couldn't take it out unless I took it for the purpose of paying that over.

Q. And it was impossible for you to get Winchell and Hathaway to go to the bank with you? Did they refuse to go?

A. No, they didn't refuse to go to the bank; they didn't go to the bank. They knew the money was in the bank, though; that they could go there with me and get it.

Q. What did you do then after this time?

A. Why, I took the matter up with the company over the phone and told them we couldn't come to any arrangement, and if I remember right, they asked me if they couldn't make a settlement, and I said I didn't think it was possible, under the way they had the thing in their attorney's hands, and that they wouldn't make a settlement of that kind; that they were more on the

order of fighting the case. I believe the matter was then referred to you and you sent out the Marshal.

Q. Were you down there at the time the automobiles were taken over by the United States Marshal?

A. I certainly was.

Q. And will you state whether or not the Marshal took possession of these cars, you made any tender.

A. Your brother made a tender.

Q. And were you present?

A. I was present.

Q. What was done?

A. I believe Mr.—their attorney answered that he understood that; that they considered the machines in their possession, their property.

Q. Was anything said with reference to the tender, its being refused or accepted?

A. Well, from what I understood from your brother, it was refused.

Q. No, not from. In your hearing?

A. In my hearing, no. Your brother was some distance from me when he made the tender.

MR. SMITH: I move to strike out the testimony in regard to the tender on the ground it is hearsay; he doesn't know anything about it.

MR. McDUGAL: Unless you heard it, that was improper.

MR. SMITH: I ask that the jury be instructed to disregard that.

COURT: The testimony in regard to a tender by Mr. McDougal is not competent, because he did not hear it.

Q. Mr. Goden, did you make a demand upon the defendants here for the possession of these cars?

A. No, I didn't make the demand.

Q. You at no time made any demand for the possession of the cars?

A. Not I.

Q. Do you know—or did you hear any one else make a demand for possession?

A. I did.

Q. Who was that?

A. Your brother and the United States Marshal.

Q. And was the demand refused?

A. Yes.

Q. What was done with this \$16,077.50?

A. Why, after the United States Marshal had taken the cars and they were in his possession three days, I was notified through my office in Portland—

MR. SMITH: Just a minute. That is objected to, if the Court please. Any conversation between him and the plaintiff, or any instructions that he gave after the action was brought is wholly immaterial.

COURT: I don't think it is material what became of the sixteen thousand.

MR. SMITH: As long as he didn't pay it to us, that is all there is to it.

COURT: As long as it didn't get to the defendants.

CROSS EXAMINATION

Questions by Mr. Hardy: You mean to say, Mr. Goden, that when the United States Marshal came to

Eugene with a writ of replevin, the defendants refused to let him take possession of the cars?

A. No, not the United States Marshal.

Q. And when the Marshal came there with a writ of replevin and demanded the cars, he got them, didn't he, on the writ of replevin?

A. He took possession of them after Mr. McDougal's brother asked you for them and you refused them. Then he introduced himself as the United States Marshal, and told you what he was going to do.

Q. That is after the action had been commenced, and the Marshal came to Eugene accompanied by Mr. McDougal's brother, was it not?

A. No. He simply came, and Mr. McDougal's brother entered first and asked you for the cars, and then you refused, and the Marshal stepped up and introduced himself as the United States Marshal and took possession of the cars.

Q. But Mr. McDougal didn't go to Eugene until after the action had been commenced, and he came with the Marshal. The Marshal had the writ of replevin in his possession at the time, didn't he?

A. Mr. McDougal and the Marshal didn't go to Eugene together. Mr. McDougal was in Eugene before the Marshal was there by a day.

Q. Don't you know it to be a fact that this writ of replevin was served on Monday morning?

A. I do not.

Q. Do you deny it?

A. I do not.

Q. Do you mean to claim that Mr. McDougal was

there on Sunday, the day before, and demanded possession of these cars?

A. I do not.

Q. Before the Monday. When do you claim Mr. McDougal ever demanded possession of these automobiles?

A. On Monday.

Q. The day the Marshal took the cars under the writ, wasn't it? I show you the original complaint; look at the date, when it was filed.

MR. SMITH: I ask the Court to take notice of the fact that the complaint was filed here on June 3d.

MR. McDOUGAL: It was Saturday, whatever it was.

Q. After this complaint was filed, and after the Marshal had the writ in his possession for a replevin in this case, was when Mr. McDougal was in Eugene, was it not?

A. He was there at that time.

Q. Why didn't you say so before?

A. I said he was there at that time.

Q. What do you claim as the selling price of these cars from the Ford Motor Company to Winchell and Hathaway? Tell the jury again the price.

A. I claim they are consigned to them on 85%, or \$374.00 plus the freight, and four dollars allowance for assembling.

Q. Who fixes the price of the automobiles?

A. The Ford Motor Company at Detroit.

Q. Both wholesale and retail?

A. Both wholesale and retail.

Q. Then you claim that the agent pays the same price for the car that the consumer pays, do you?

A. No, I do not.

Q. Are you familiar with these invoices?

A. I am.

A. Are not these the invoices of the cars in question, that I hand you now?

A. Invoices on the cars in question, yes.

Q. What does it mean when it says here "Ford Motor Company sold to Eugene Ford Auto Company 8 touring cars," giving the price?

A. According to their contract, consigned to them on this basis.

Q. Would the Ford Motor Car Company ever receive another dollar from Winchell and Hathaway, the agents, after they had paid these invoices?

A. They might.

Q. They might—how?

A. According to the contract, which advises the stipulations stated in there.

Q. Do you mean to testify that there was any further price to be paid the Ford Motor Company?

A. I do.

MR. McDOUGAL: I object to that. The contract speaks for itself.

MR. HARDY: He has undertaken to testify as to what the price is.

COURT: He can answer the question.

A. Yes, the paragraph I read to the jury provides in there, they shall pay ten per cent more if they want to get full bill of sale for the cars.

Q. As a matter of fact did they pay any more after these invoices were marked "Paid"?

A. Not that I know of.

Q. They didn't pay any more, did they?

A. I don't know.

Q. And they got a paid receipt in full, didn't they?

A. I don't know.

Q. Now, did you offer Winchell and Hathaway that Friday night in the hotel, cash?

A. Told them it was in the bank. I couldn't get in the bank then.

Q. Did you offer them a check for the money?

A. Told them I had the right to draw a check, yes.

Q. You simply told them the money was there and you could give a check the next morning, and I told you we would take it under advisement, didn't I, and you said the offer was withdrawn, didn't you?

A. I told you at the time, speaking to you at the time, as far as you were concerned, the offer was withdrawn. I was talking to Hardy.

Q. You knew I was representing Hathaway and Winchell?

A. Not the way you came. You didn't say so until you got to the room.

Q. They told you I was their attorney?

A. Not until we got in the room.

Q. And we three came into the room?

A. The fact is, I didn't know you were following me up, going into the room.

Q. You didn't put me out of the room?

A. No, I didn't.

Q. And you told us then and there the money was in the bank and you could give us a check the next morning?

A. Yes.

Q. That is as far as you went in making a tender, when you said that?

A. I said this—I want to correct you. I said “According to the contract the money was in the bank to pay them for the amount of money they had invested in these cars.”

Q. When I told you we would take the matter under advisement, didn’t you then and there say the offer is withdrawn?

A. I said “No advisement in this case as far as you are concerned.” The offer was withdrawn. That was you.

Q. As the three of us walked out of the room, didn’t you follow us out of the room, and repeat the offer was withdrawn, shaking your fist?

A. I have no recollection of that; I had no reason for shaking my fist.

Q. And didn’t you follow us way over to the elevator entrance—

A. No.

Q. (Continuing) and say the offer is withdrawn?

A. I did not.

Q. Now, Mr. Goden, didn’t you, that evening in the room, you and Mr. Vick being present, I and Mr. Winchell and Mr. Hathaway, tell us that you had been down to Portland, and that you had had a conversation with the officers here, the local officers here, of the Ford Motor Company, and that the company wouldn’t stand

for paying us back our contract deposit money? Didn't you tell us that and our bonus money?

MR. McDOUGAL: Object to that as incompetent, irrelevant and immaterial. There was nothing gone into on direct examination with reference to the bonus money.

COURT: You went into part of that conversation and certainly counsel has a right to all of it.

MR. McDOUGAL: And for the further reason that the question does not specify with whom the conversation was had in Portland.

COURT: He is asking about a statement supposed to have been made to these people in Eugene.

MR. SMITH: What he told us.

MR. McDOUGAL: Save an exception.

Q. Didn't you tell us that?

A. Repeat the question, please.

Q. Didn't you, at the time you have testified about, in the Osborne Hotel, on Friday night, Mr. Vick being present, in your room at the hotel, Mr. Winchell, the defendant, being present, Mr. Hathaway, the defendant, and myself, we all being present in the room, didn't you make a statement to us that you had had a conversation with the officials of the company here in Portland, that is Mr. Norman, the assistant manager, and that they would not consent to the payment back of the deposit money and of the bonus money?

A. I did.

Q. And then you said "All I can do for you boys is to give you back"—"get you what you paid for the cars."

A. I didn't say "get you"—I said "Give you back."

Q. "The money is in the bank"—didn't you?

A. Yes.

Q. "And I can give you a check for it tomorrow morning"?

A. Yes.

Q. And I said we would take it under advisement and you said the offer is withdrawn?

A. I said as far as you were concerned; you wasn't in it; you didn't have anything to do with it.

Q. Do you want to make it appear now, when you said the offer was withdrawn, it was only withdrawn on my account, and not with Winchell and Hathaway?

A. Absolutely. I didn't see where you came in at; I had no business with you.

Q. Did you in that conversation say the offer was withdrawn as to Winchell and Hathaway?

A. I did not.

Q. Why did you withdraw any offer to me? I wasn't getting any money from you. You hadn't offered me any money.

A. I didn't want to have anything to do with you. You wasn't in it.

Q. Why did you say the offer was withdrawn if you had nothing to do with me?

A. Because I didn't want you to understand that you had anything to do with it.

Q. Is that the only explanation you can give of saying the offer was withdrawn?

A. That is all, sir.

Q. How many times was McDougal's brother at Eugene, then afterwards?

A. Once.

Q. That was Monday, June 5th.

A. He came on Sunday.

Q. But he saw them on Monday, June 5th?

A. Yes, sir.

Q. After this action was commenced?

A. Sir?

Q. After this action was commenced?

A. He saw them, you say?

Q. Yes.

A. Yes.

Q. And after the action was commenced?

A. I don't know when the action was commenced.
I wasn't in Portland at the time.

Q. If the action was commenced on the third. Now, you have testified as to the value of these cars before this jury, and you have testified as to the retail value of the cars, haven't you?

A. The retail value?

Q. Yes, that is what I or any other man would pay.

A. I testified that is what they were consigned to the agents for.

Q. Now, I will show you the original complaint in this case, which is sworn to by Mr. McDougal, and I will ask you to look at the complaint in this case, and will ask you if this sum mentioned in the complaint is the same price which you have testified to, to the jury, as to the price of the cars.

A. It is the price that the cars were consigned to the agents for.

Q. It says here that is the full value.

A. Full value of the cars as far as the agent is concerned.

Q. You fix the selling price to the public, that is the Ford Motor Car Company does?

A. The Ford Motor Car Company does.

Q. And as far as the agent is concerned, the price and value of the cars is the amount that was sworn to in this complaint, is it not?

A. As far as the agent is concerned?

Q. Yes.

A. That is what they are consigned to the agents for.

Q. You insist on the word "consigned."

A. I only know my contract as a consigned contract, sir.

Q. Well, will you kindly read the sworn complaint in this case and notice that it says here that the value of the cars is \$16,077.50?

A. I see that in there.

Q. That is the price the agent paid for the cars, isn't it?

A. That is the price they were consigned to him for, sir.

Q. That is all he was ever to pay for them, isn't it?

A. I do not know. That would depend on the conditions.

RE-DIRECT EXAMINATION

Questions by Mr. McDougal: Mr. Goden, why were you down there conferring with Winchell and Hathaway concerning this \$16,077.50?

A. Because our contract provides that we shall pay them back their money for the automobiles they have on hand if we cancel their contract, and it was my instructions from my manager, Mr. Norman to do so.

Q. And you at no time, prior to the Monday that the Marshal took these automobiles, asked them for the automobiles in question?

A. No, I do—no.

Q. Made no demand upon them?

A. No.

Witness excused.

F. C. McDUGAL, a witness called for the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. McDougal: Mr. McDougal, when did you go down to Eugene, on Saturday or Sunday or Monday, with reference to this Winchell and Hathaway matter?

A. I believe I went down Saturday and stayed over Saturday and Sunday.

Q. Will you state whether or not you made any demand upon the defendants for the possession of a certain number of automobiles in their custody.

A. Just prior to the time that the United States Marshal and his deputy went in and took the cars, I made a demand upon Mr. Hathaway and Mr. Winchell, who were there in their garage, for the cars, asking them to give back all the cars; told them who I was and that I represented the Ford Motor Company.

Q. Was there anything said by you at that time with reference to tendering back the money?

A. There was something said in regard to the money due these men, Hathaway and Winchell, now being in the bank there at Eugene, and told them that they would get their money back, and that the money was waiting for them; either Mr. Goden or myself said that, but I don't know which one of them, but I am pretty sure I said it, though I am not positive.

CROSS EXAMINATION

Questions by Mr. Smith: Mr. McDougal, you were there only the once, weren't you?

A. I was there only once, just prior to the time the United States Marshal took the cars.

Q. That was on Monday?

A. Yes, Monday morning.

Q. So if the case was started here on Saturday, you never made any demand yourself before Monday, after the case was started?

A. No, I made the demand just prior to the time the United States Marshal took the cars.

Q. And you had the United States Marshal there to take possession of the cars if they didn't turn them over at once?

A. Yes, sir.

Q. So the suit must have been started, for the Marshal was there; had the papers, didn't he?

A. Yes, sir.

Q. Ready to grab them?

A. About five minutes before the—

Q. About this alleged tender, what is it you say was told them?

A. Either Mr. Goden or myself, but I believe I said it myself too, told Mr. Hathaway and Mr. Winchell, I think Mr. Hardy was there, and several others, that the money on these cars, which they had paid in would be given back to them. I don't know whether I said it or Mr. Goden; either one of us stated at the time.

Q. That is all you did. You didn't offer the money or offer a draft of any kind?

A. No, I made no other offer.

Q. On Saturday when the case started, they didn't deposit any such sum in court?

A. No, I think the money was laying down in the bank all the time.

Q. When did you first meet Mr. Hardy?

A. Monday morning.

Q. This morning of June 5th, 1916?

A. The day the cars were taken back. I don't know the exact date.

Q. You never met him before, until then, did you? That is, he was a stranger to you until that time, wasn't he?

A. I believe he was.

Witness excused.

WILLIAM S. McNAMARA, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. McDougal: Mr. McNamara, you held what position with the plaintiff, the Ford Motor Car Company, during the months of May and June, 1916?

A. Chief clerk.

Q. And as chief clerk, what did your duties consist of with reference to the Eugene Ford Auto Company?

A. Well, I have charge of all the accounts and records of the Ford Motor Company.

MR. McDOUGAL: Did you introduce the records, the bills?

MR HARDY: No, these are to be offered by us as a part of our defense; you will have to take the drafts that go with them, if you take them.

Q. Do you recall Mr. Goden coming up to the office of the Ford Motor Company there, here in Portland, and making a report upon the Eugene Ford Auto Company?

A. I do.

Q. And what was said by Mr. Goden at that time?

MR. SMITH: That is objected to as incompetent, immaterial and irrelevant, if the Court please.

COURT: When was that? I think the objection is well taken.

Q. Mr. McNamara, did you go down to Eugene?

A. No, sir.

Q. Have you ever had any conversation at all with the defendants, Winchell and Hathaway, in this case?

A. No, sir, not in regard to this case.

Q. You know nothing about this particular case except as it has come through your hands as chief clerk over there?

A. That is all.

CROSS EXAMINATION

Questions by Mr. Hardy: You say you are the chief clerk that had charge of the Winchell and Hathaway matters?

A. Yes, sir.

Q. Can you identify then these invoices and drafts for these automobiles that were invoiced to them, and paid for by them? I will ask you if these were issued out of your office in payment of the automobiles in question, these being the invoices and drafts by which the Ford Motor Car Company received payment?

A. That is the form we used in connection with our business.

Q. And those are the accounts that you had charge of, of course, and you can identify them?

A. Yes, sir.

MR. HARDY: We will offer in evidence the invoices and drafts, showing payment for these automobiles.

MR. McDUGAL: No objection.

MR. HARDY (reading): "Ford Motor Company, sold to Eugene Ford Auto Company, Eugene, Oregon, 8 touring cars, 56 tread, \$3520.00; less 15%, \$528.00; \$2992.00. Prop. freight Detroit to Portland, \$335.00—\$3327.54." "Ford Motor Company, sold to Eugene Ford Auto Company, 8 touring cars, 56" tread." "Ford

Motor Company, sold to Eugene Ford Auto Company, 8 touring cars, 56" tread." One of these is "Sold Eugene Ford Auto Company, Eugene, Oregon, May 25, 1916, assembly stock; date shipped May 25, 1916. Terms strictly net cash. One runabout 56" tread, \$390.00, less 15%, \$58.50, balance \$331.50. Retail freight Detroit to Portland, \$53.25; 10 gallons gas and 4 quarts oil, \$2.35. Total \$387.10." This last being a car that was driven up to Eugene, instead of going by freight, and paid for here.

A. That last car in Portland was delivered to a traveling man in Portland for their account, a man by the name of Matthews.

MR. McDOUGAL: Was not in this consignment at all.

A. Was not in the carload.

COURT: One of the cars in controversy; was delivered here to a traveling man in Portland on account of Eugene.

A. No, it was not one of the cars that was replevined.

COURT: I beg pardon; I thought it was.

MR. HARDY: It was simply offered in connection with the statement. This witness testified as to the course of dealing; this witness has testified that he knew about their account, and I offer this for the purpose of showing the course of dealing, and as a part of the cross examination in connection with the testimony of their witness.

COURT: I think it is competent for that purpose; I thought it was one of the cars in controversy.

MR. McDOUGAL: This is introduced to show custom?

MR. HARDY: Goes to show we bought and paid for the cars; that is all it is offered to show.

MR. McDOUGAL: We object to its introduction on this.

COURT: I think it is competent.

MR. SMITH: I will ask this witness some questions, with your Honor's permission.

Questions by Mr. Smith: Mr. McNamara, I will show you this invoice dated March 13, 1916, and the draft dated March 14, 1916; these two constitute the papers in one transaction, don't they; that is, that draft accompanied the invoice?

A. Accompanied the bill of lading.

Q. Well, that is the draft made on this invoice, then?

A. Well, I couldn't state as to that because it does not give the car number.

Q. How much is the draft for?

A. \$3327.54.

Q. How many cars in the invoice?

A. Eight.

COURT: You say the draft accompanied the bill of lading. The cars were shipped to these people, bill of lading with draft attached?

A. Yes, sir.

COURT: And you drew on them for the amount and sent it accompanied by bill of lading?

A. Yes, sir.

COURT: And before they got the cars, they had to pay that draft?

A. Yes, and invoice sent to them for checking record.

Q. This is the invoice that accompanied that draft as a checking measure?

A. Yes, sir.

MR. SMITH: I ask that the draft and invoice be marked as one exhibit.

Marked DEFENDANTS' EXHIBIT A.

Ford	Ford Motor Company	Invoice
	Portland	
Sold to Eugene Ford Auto Company		
Eugene, Oregon.		
Charge same.	Order date Mar. 13, 1916.	
Terms strictly cash, Norman	Assg. stock	
	Date shipped Mar. 7, 1916.	
	Farmers and Merchants Bank,	
	Shipped via	
8 Touring cars, 56" tread		\$3520.00
Less 15%		528.00
		<hr/>
		\$2992.00
Prop. freight Detroit to Portland.....		335.54
		<hr/>
		\$3327.54

Motor Nos.

1067411

1067426

1067396

1067382

1068830

1067377

1068781

1067415

Dated at Portland, Oregon, Mar. 14, 1916.

\$3327.54

No. 1822

Ford

Ford

At sight, on arrival of goods, pay to the order of

(Bank) Lumbermens National Bank

Thirty-three hundred twenty-seven and 54/100

Dollars (with exchange)

Value received and charge to the account of

S. P. 6686

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid May 24, 1916

Eugene, Oregon.

Q. Invoice dated April 4, 1916, and draft April 3, 1916, they relate to the same transaction?

A. I couldn't state fully unless I had my records here to tell.

Q. From looking at the records you have that is your best recollection of it, is it not?

A. I should think they were. I could tell positively if I had my draft book.

Q. The draft and invoice are in the same amount and made practically on the same date?

A. They are.

MR. SMITH: We offer this draft and invoice as one exhibit.

Marked DEFENDANTS' EXHIBIT B.

Ford	Ford Motor Company	Invoice
	Portland	
Sold to Eugene Ford Auto Company		
Eugene, Oregon.		
Charge same.	Order date April 4, 1916.	
Terms strictly net cash.	Date shipped 4-23-16	
	Customers order	
	Contract	
	Shipped via S. P. in U. P. 175291	
8 Touring cars, 56" tread.....		\$3520.00
Less 15 %		528.00
		<hr/>
		\$2992.00
Prop. freight Detroit to Portland.....		333.54
		<hr/>
		\$3327.54

Mot. Nos.

1116510

1067484

1022282

1008770

1116461

1116486

1116479

1116459

Dated at Portland, Oregon, Apr. 3, 1916.

\$3327.54

No. 1894

Ford

Ford

At sight, on the arrival of goods, pay to the
order of

(Bank) Lumbermens National Bank

Thirty-three hundred twenty-seven and 54/100

Dollars with exchange

Value received and charge to the account of

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid May 24, 1916

Eugene, Oregon.

Q. I will now show you invoice dated March 28, 1916, for \$3329.87, and draft dated March 29, 1916, for \$3329.87. They relate to the same transaction, do they?

A. Yes, sir.

Mr. Smith: We offer this draft and invoice as one exhibit.

Marked DEFENDANTS' EXHIBIT C.

Ford	Ford Motor Company	Invoice
	Portland	
Sold to Eugene Ford Auto Company		
Eugene, Oregon.	Assg. stock	
Charge same.	Order date Mar. 28, 1916.	
Terms Norman	Date shipped Mar. 28, 1916.	
	First National Bank	
	Shipped via	
8 Touring cars, 56" tread.....		\$3520.00
Less 15%		528.00
		<hr/>
		\$2992.00
Prop. freight Detroit to Portland.....		337.87
		<hr/>
		\$3329.87

1115500

1115957

1115941

1115931 C. I. cover

1115943 "

1115933 "

1116008 "

1115791 "

Dated at Portland, Oregon, March 29, 1916.

\$3329.87

No. 1877

Ford

Ford

At sight, on the arrival of goods, pay to the
order of

(Bank) Lumbermens National Bank

Thirty-three hundred twenty-nine and 87/100

Dollars with exchange

Value received and charge to the account of

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid May 24, 1916

Eugene, Oregon.

Invoice for runabout, May 25, 1916, \$387.10, marked

DEFENDANTS' EXHIBIT D.

Ford	Ford Motor Company	Invoice
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Portland, Ore.

Sold to Eugene Ford Auto Company

Eugene, Oregon.

Order date, May 25, 1916.

Charge same.

Assg. stock.

Terms strictly cash.

Date shipped May 25, 1916

Norman

Shipped via

Customers order

Paid

1 Runabout, 56" tread	\$390.00
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Less 15%	58.50
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\$331.50

Retail freight Detroit to Portland.....	53.25
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10 gal. gas and 4 qts. oil. 2.35

\$387.10

1208507

Paid May 25, 1916
Ford Motor Company
Per Van H.

RE-DIRECT EXAMINATION

Questions by Mr. McDougal: How do you account for the fact that the invoices have the word "Sold"?

MR. SMITH: Just a moment. That is not ambiguous. The testimony is not admissible unless an ambiguous word. The word "sold" has a definite meaning.

Q. I will withdraw that and put it in this way: Will you explain if any reason why this particular form of invoice was used in this transaction.

MR. SMITH: Objected to as incompetent, irrelevant and immaterial. The transaction was cash; they paid cash before they took these automobiles out of the car, before they got them in their possession.

COURT: I think the witness may explain any statement that may be on that invoice; it is not a contract between anybody; it is simply a memorandum. He can explain it, if any mistake about it, I suppose.

A. It is simply a memorandum of shipment, and not to be construed as an invoice, because the cars were shipped on consignment, and at a time last spring when we were short of the regular form of automobile orders, as we call them, and had to use the invoices, parts invoices

for shipping sheets for agents, to give them the numbers. to check their cars.

Q. In other words, you used this particular form because you were out of the other form which you customarily used in these transactions?

A. That is it.

RECROSS EXAMINATION

Questions by Mr. Hardy: Mr. McNamara, do you mean to say you didn't use this same form for the two years before? What are you going to say when I produce the forms used two years before?

A. I think you will find a great many of them different.

Q. Do you want to be understood before this jury, the reason you used this form was because you were out of the other form, and it is not the same identical form you used during the previous two years, while they were your agents?

A. They are not the form we are using now. I don't know about two years ago.

Q. Please return after lunch. I will have these here and show them to you.

Whereupon proceedings were adjourned until 2 p.m.

Tuesday, September 5, 1916, 2 p.m.

F. B. NORMAN, recalled by the plaintiff.

DIRECT EXAMINATION

Questions by Mr. McDougal: Mr. Norman, I believe you have already testified that you are the man-

ager, or were the manager at this time, of the Ford Motor Company, here in Portland?

A. Yes, sir.

Q. Will you state what this \$16,077.50 that you sent down to Eugene to Mr. Goden was for.

MR. SMITH: Objected to as incompetent, irrelevant and immaterial, nothing to do with this case; they don't claim they ever tendered it to us except as testified here this morning. That is another matter. Not deposited in Court, and not kept good anyway.

MR. McDOUGAL: This is more for the purpose of getting at the value of the cars.

COURT: Very well; proceed.

A. Refund on cars that had been paid by the Eugene Ford Auto Company.

Q. What do you mean by refund?

A. The money that they had paid to the bank on the cars that they had taken over from the—that we had shipped to them.

Q. Now, it is pleaded in the complaint here that the plaintiff tendered into Court and have tendered into Court with the clerk, the sum of \$3401.12. Will you state to the jury how that amount was arrived at as a refund on these cars.

MR. SMITH: Just a moment, if the Court please. I want to correct that question, or statement of facts. That statement is not in the original complaint; the tender was not made with the original complaint; they have filed an amended complaint. If they will change that question, so it will show the amended complaint.

MR. McDOUGAL: Change that and put in the word "amended." So the question is correct.

Q. '(Read as follows: Now, it is pleaded in the amended complaint here that the plaintiff tendered into Court and have tendered into Court with the clerk, the sum of \$3401.12. Will you state to the jury how that sum was arrived at as a refund on these cars.)

A. I am not familiar with those figures at this time.

Q. What does this \$3401.12 represent?

A. It represents the contract deposit and rebate they have coming on cars over a certain volume of business that they had on straight 15%; we pay a certain rebate, additional rebate, and that is the earned rebate.

Q. What became of this \$12,676.38 that was sent down to Eugene for the purpose of returning to the defendants in this case?

MR. SMITH: Objected to as incompetent, irrelevant and immaterial. Nothing to do with this case, inasmuch as it was not tendered in Court here, and was never paid the defendants.

COURT: I don't suppose it was necessary to tender into Court if they offered to repay to the defendants before they undertook to take possession.

MR. McDOUGAL: We want to show why we didn't tender this money into Court; it is proper to show at this time.

COURT: I don't suppose paying into Court would make any difference. If I understand that contract you were obliged to refund this money before you took possession of the cars. If you didn't do it, you were not entitled to possession of the cars and you couldn't vest

the title in yourself by a tender to the Court later.

Q. (Read)

A. That was paid to the bank on mortgage they had given for these cars.

MR. SMITH: We move to strike that out, if the Court please. There was no payment before this action was begun at all, and no payment to us, or for us, or with our authority, to anybody.

COURT: They will have to show it was done with the authority of the defendants, or paid to them before the action was commenced, as I understand it.

Q. For what purpose did you say this was paid to the bank, this money?

A. Money that they had advanced on these cars for the Eugene Ford Auto Company.

Q. Do you know whether or not it was impossible for the Ford Motor Company to get possession of these cars, as far as the bank was concerned, until this money had been paid to the bank?

MR. SMITH: Objected to; that calls for a conclusion of the witness. Let him state the facts if they will justify such a position, and the man knows.

COURT: I think the objection is well taken, and I don't see that it has anything to do with the merits of this particular case on trial now.

MR. SMITH: They took the cars under the writ. It is admitted here that the Deputy Marshal was down there and took the cars immediately after Mr. McDougal's brother made the alleged demand on that Monday morning.

CROSS EXAMINATION

Questions by Mr. Hardy: Mr. Norman, at the time this controversy arose, you were the manager of the Ford Motor Company at Portland?

A. Yes, sir.

Q. And as such had charge of their business in the state of Oregon?

A. Yes, sir.

Q. You are not the manager for them now?

A. Not at this particular place, no.

Q. Have nothing to do with their business in Oregon, any more?

A. No, sir.

Q. At what date do you claim you gave the First National Bank at Eugene the twelve thousand dollars?

A. Sixteen thousand, I think it was, the value of the cars. I don't remember the dates now; it was at the time, though, after the cancellation went into effect.

Q. You don't know the date?

A. I haven't it here, no.

Q. You don't know how much you gave the First National Bank, either, do you?

A. Well, I don't remember the figures.

Q. It was after this action was begun? You know that, don't you?

A. Not that I know of, no.

Q. Don't you know, as a matter of fact, that it was not only after the action was begun but after the answer was filed?

A. No, sir.

Q. You don't know that that statement is not true, though, do you?

A. There was no action begun at the time I authorized this money from the Lumbermens Bank to be sent to Eugene.

Q. No, I mean at the time you paid it to the bank. You say you paid some money to the First National Bank at Eugene. Don't you know, as a matter of fact, you didn't do that until after this action was commenced and after the answer was filed?

A. That is probably so. I wouldn't say.

Q. Can you say how big a business the Ford Motor Company did last year?

A. Not offhand, no.

Q. Isn't it a fact that the Ford Motor Car Company made and sold over a thousand cars a day?

A. I wouldn't say that, no.

MR. McDOUGAL: I object to that as improper cross examination.

MR. HARDY: I think that is part of our own case, anyhow.

MR. McDOUGAL: Here is that telegram you asked for.

Q. Is this the telegram you sent to Winchell and Hathaway before you sent the registered letter?

A. Yes, sir.

MR. HARDY: We offer it in evidence, if your Honor please.

MR. McDOUGAL: For what purpose is that offered in evidence? To show cancellation of the contract?

MR. HARDY: The purpose it is offered in evidence for is it tends to show your course of conduct towards us. Tends to show malice, too.

Marked DEFENDANTS' EXHIBIT E, and read as follows:

"Portland, Oregon, May 24, 1916.

Eugene Ford Auto Co.

Eugene, Oregon.

Be advised that your contract is cancelled. The territory and your stock will be taken over by Vick Brothers who will open a branch at Eugene.

FORD MOTOR COMPANY."

Witness excused.

W. S. McNAMARA, RECALL FOR FURTHER CROSS EXAMINATION

Questions by Mr. Hardy: You testified this morning that you had run out of your regular form of invoice and were using a different form. Examine these now, and see if you don't want to correct your testimony.

A. Well, we have a different form that we use.

Q. Well, do you want to make any correction whatever of your testimony? Is there anything different in these forms of invoice showing the sale, and cancelled draft, from those used in 1916?

A. No.

Q. Those were used in 1916. Do you want to claim you used any different form in 1914 and 1913, now?

A. No.

Q. Then you were all wrong when you said that was the reason this morning, weren't you?

A. We have a new form now.

Q. But you were wrong when you said this morning that you had run out—

A. That is—

Q. That is you were mistaken.

MR. HARDY: I would like to offer these as a part of the cross examination to show the identical form.

Marked DEFENDANTS' EXHIBIT F.

Ford	Ford Motor Company	Invoice
	Portland	
Sold to Eugene Ford Auto Company		
Eugene, Oregon.		
Charge same,	Order date June 2, 1915,	
Terms strictly cash	Shipped June 2, 1915.	
	Customers order	
	Contract	Shipped via
8 Model T Touring cars fully equipped 56"		
tread		\$3920.00
Less 15%		588.00
		<hr/>
		\$3332.00
Proportional freight Detroit to Portland.....		334.94
		<hr/>
		\$3666.94

681759

681799

682025

682050

682064

682065

682067

682072

Dated at Portland, Oregon, June 2, 1915.

\$3666.94

No. 1218

Ford

Ford

At sight, on the arrival of goods, pay to the order of

(Bank) Lumbermens National Bank

Thirty-six hundred and sixty-six and 94/100

Dollars with exchange

Value received and charge to the account of

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid

Eugene, Oregon.

Ford

Ford Motor Company

Invoice

Portland

Sold to Eugene Ford Auto Company

Eugene, Oregon.

Charge same,

Order date Sept. 9, 1915.

Terms strictly cash

Shipped Sept. 9, 1915.

Customers order

Contract

Shipped via

8 Touring cars 56" tread.....	\$3520.00
Less 15%	528.00
	<hr/>
	\$2992.00
Freight Detroit to Portland.....	363.68
Speedometers	48.00
	<hr/>
	\$3403.68

854469

850522

862641

862644

862651

862660

862711

862727

Dated at Portland, Oregon, Sept. 8, 1915.

\$3403.68

No. 1398

Ford

Ford

At sight, on the arrival of goods, pay to the
order of

(Bank) Lumbermens National Bank

Thirty-four hundred and three and 68/100 Dol-
lars with exchange

Value received and charge to the account of

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid

Eugene, Oregon.

Ford Ford Motor Company Invoice
 Portland

Sold to Eugene Ford Auto Company
 Eugene, Oregon.

Charge same Order date Mar. 20, 1915.

Terms strictly cash Date shipped Mar. 20, 1915.

Customers order

Contract Shipped via

7 Model T Touring cars\$3430.00

1 Model T Runabout 440.00

\$3870.00

Less 15%\$ 580.50

\$3289.50

Proportional freight Detroit to Portland..... 332.38

\$3621.88

Motor No. Car No.

686592 604969

686560 604979

686524 604982

686608 604983

686547 604985

687279 604989

687978 604994

694367 622112

Dated at Portland, Oregon, Mar. 6, 1915.

\$3667.42 No. 933

Ford Ford

At sight, on the arrival of goods, pay to the
 order of

Ford Motor Company

(Bank) Lumbermens National Bank
 Thirty-six hundred sixty-seven and 42/100
 Dollars with exchange
 Value received and charge to the account of
 Ford Motor Company,
 R. Van Harriseen,
 Cashier.

To Eugene Ford Auto Co.,
 Eugene, Oregon.

C/o First National Bank.

First National Bank
 Paid
 Eugene, Oregon.

Ford	Ford Motor Company	Invoice
	Portland	

Sold to Eugene Ford Auto Company
 Eugene, Oregon.

Charge same. Order date May 12, 1915.

Terms strictly cash. Date shipped May 12, 1915.

Customers order

	Contract	Shipped via
7 Model T Touring cars equipped 56" tread . . .		\$3430.00
1 Model T Runabout equipped 56" tread		440.00

\$3870.00

Less 15% 580.50

\$3289.50

Proportional freight Detroit to Portland 331.58

\$3621.08

681514

681516

681533

681543

681610

681635

681795

681849

Dated at Portland, Oregon, May 12, 1915.

\$3621.08

No. 1175

Ford

Ford

At sight, on the arrival of goods, pay to the
order of

(Bank) Lumbermens National Bank

Thirty-six hundred twenty-one and 08/100
Dollars with exchange

Value received and charge to the account of

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid

Eugene, Oregon.

Ford

Ford Motor Company
Portland

Invoice

Sold to Eugene Ford Auto Company

Eugene, Oregon.

Charge same.

Order date May 14, 1915.

Terms strictly cash.

Date shipped May 14, 1915.

Customers order

Contract

Shipped via

8 Model T Touring cars\$3920.00

Less 15% 588.00

\$3332.00

Proportional freight Detroit to Portland..... 334.75

\$3666.75

681666

681687

681691

681700

681724

681726

681734

681748

Dated at Portland, Oregon, May 11, 1915.

\$3666.75.

No. 1189

Ford

Ford

At sight, on arrival of goods, pay to the
order of

(Bank) Lumbermens National Bank

Thirty-six hundred sixty-six and 75/100 Dol-
lars with exchange

Value received and charge to the account of

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid

Eugene, Oregon.

A. I might state that this new form I had reference to is all bound together and the agents' shipping sheet was made a part of the form, and we didn't have those. We were using the old form, and we ordered the others from the factory, and they told us to use what we had on hand until they were used up, before we used the new one.

Q. During all the time that the Ford Motor Car Company did business with Winchell and Hathaway, they used this same form, didn't they?

A. Yes, sir.

Q. And you were mistaken in saying that they had used another form?

A. I was mistaken; I looked up the information today.

REDIRECT EXAMINATION

Questions by Mr. McDougal: What is that book you have there?

A. Automobile orders.

Q. Are those the originals of the copies of those orders they have?

A. This is the original order.

Q. Are the original orders for these particular copies that they have introduced in evidence in that book? Are those original orders the same as the copies?

A. Supposed to be. Those are carbon copies of the originals.

Q. Do the original orders have on them the same wording as the copies?

A. No.

Q. Wherein are they different?

A. The original orders says "Ship to Eugene Ford Auto Company and charge same," and as I said this morning, this is a memorandum for the agent to check his numbers by.

COURT: What do you mean by original orders.

A. It is order to ship cars.

COURT: Order from the agent or dealer?

A. No, it is an order from the office.

COURT: Office?

A. An order from our office to the shipping department to ship cars.

COURT: Not from the dealer?

A. Not from the dealer.

MR. SMITH: If the Court please, that is not binding upon the defendants. It is their manner of handling the transaction themselves. We move to strike out upon that ground.

MR. McDUGAL: That is all right. Just this one question.

Q. Would the agent ever come in touch with these original orders you have in the book?

A. He wouldn't unless he came in the office to check up. Came to check up their accounts.

Q. All the invoices which were sent out, which were purported copies of these house orders you have there were different, in that instead of having the word "Ship to" they should have the word "Sold to"?

A. Yes, sir. We just used the invoice for their information in giving the order; that is why we used that.

RECROSS EXAMINATION

Questions by Mr. Smith: Let me see one of those "Ship to" businesses you have in there. All right, take the one of March 14, 1916; draft March 14, 1916, invoice March 13.

A. March 14, 1916, March 14, Automobile Order No. C-1122.

Q. Now, I will ask you, right over here, read that—right from your book.

A. Is that the one.

Q. Yes, that is the one.

A. Let's see the number.

Q. This is the one, isn't it. Now, will you kindly read the entire document in evidence; start right here; first up here; that same little picture up there with the word "Ford."

A. Yes, "Universal Car. Automobile Order." This isn't the same.

Q. You read what is on there.

A. "Ship Eugene Ford Auto Company."

Q. Isn't it "Sold to" over there?

A. No, sir.

Q. What is it?

A. "Ship."

Q. That is the order you say you have among yourselves down there?

A. Yes, sir.

Q. That never goes out to customers at all?

A. No, sir.

Q. This is what goes out to the customer, where it says "Sold to."

A. That goes out, a memorandum for checking.

Q. With that memorandum for checking which you make, you make a draft which has to be paid before he gets possession of the cars?

A. That is the idea. A sight draft is attached to the bill of lading. Do you want the rest of this read?

A. No, that is the material part. Read it if you want to, if you want to make your record. As far as I am concerned, I don't care for it.

REDIRECT EXAMINATION

Questions by Mr. McDougal: Was there anything else that went to agents besides this invoice with the "Sold to" on it?

A. No.

Q. That was sent how, by mail?

A. That was mailed out, yes.

Q. And bill of lading and draft were attached, and also sent by mail?

A. Yes, in the event that shipment was made to sub-agent a copy was sent to the Limited Agent, and also to the sub-agent. If we shipped the cars, say to Junction City, why we would say shipped to agent at Junction City, whatever it was, charge Eugene Ford Auto Company, and would draw a draft on the agent at Junction City, and this memorandum invoice that we sent out, we would send to the Junction City Limited Agent so he could check his accrued bonus.

Witness excused.

PLAINTIFF RESTS

V. W. WINCHELL, a witness called on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Hardy: Mr. Winchell, you are one of the defendants in this case, a member of the firm of Winchell & Hathaway?

A. Yes, I am.

Q. Doing business as the Eugene Ford Auto Company?

A. Yes, sir.

Q. How long were you and your partner agents for the Ford Motor Car Company at Eugene?

A. We were going on our third year, on our third contract when we were notified by telegram.

Q. Talk up so the jury can hear you.

A. We were going on our third year, on our third contract with the Ford Motor Company up to the time of this discussion.

Q. Mr. Winchell, you received a telegram, did you, of which copy was offered in evidence?

A. Yes, sir.

Q. And the registered letter?

A. Yes, sir.

Q. State whether or not you know Mr. Goden?

A. I do.

Q. Who testified here.

A. Yes, sir.

Q. How long have you known him?

A. Why, I can't exactly say, but we had business dealings with the Ford Motor Company through Mr. Goden on and off during our whole experience with the Ford Motor Company, you might say.

Q. That he would call on you?

A. Yes, sir.

Q. Representing the Ford Motor Company?

A. Representing the Ford Motor Company, yes, sir.

Q. And you dealt with him as you would the company, did you?

A. Yes, sir.

Q. Mr. Winchell, you may state to the jury whether or not he came to Eugene about the time you received this registered letter.

A. Yes, following this telegram, Mr. Goden appeared in Eugene and called on us.

Q. Now, tell the jury what he said and what took

place between you and your partner and Mr. Goden with reference to these cars. What he proposed.

A. Following this telegram, I believe it was the following day, Mr. Goden called on us.

Q. Speak up so the jury can hear you.

A. The following day, following this telegram, Mr. Goden called on us and told us that he had received a letter from the Ford Motor Company telling him to come there and settle this matter, this difficulty that had arisen and use discretion. I remember his using that phrase, and he also spoke up that he thought that we—he wouldn't be a bit surprised if we did resent it, but it wasn't the best thing for us to do; that the Ford Motor Company were a very large concern, and that they would undoubtedly keep it in the courts for an unlimited length of time, and that he had a plan whereby, after our considering it, he thought it would be best for us to consider and accept; and his plan was that he told us that Mr. Vick would take all our stock, our merchandise, accessories, office fixtures and everything that we had in our place, on inventory price, at what we paid for it, and that he would get us our contract deposit money, of which we put \$800.00 with the Ford Motor Company. That is necessary in order to do business with the Ford Motor Company; have to put up this deposit. And also our bonus money that accrues through volume of business. He agreed to do all of this. We—after Mr. Hathaway and I considered the matter—told them, told Mr. Goden—this was the following morning, Mr. Vick, one of the Vick Brothers, Mr. Goden and ourselves met at our place of business, and the proposition was repeated, and we

told them that we decided we would accept the proposition on this understanding: That after we had taken stock with Vick Brothers and everything was satisfactory, that we had enough contracts with the Ford Motor Company; that we had all of that we wanted; that if they were ready to put down what they owed us, and they would give us what was coming to us, in cash on our counter, we would accept the proposition. And he told us all right, if that is all we wanted, he would go to Portland and get the cash. That took place, I believe—following Mr. Goden, we didn't see him for the next day or so, but when he did come back, he spoke as Mr. Hardy talked this morning.

Q. You remember the action was commenced Monday morning?

A. Yes, sir.

Q. The papers were served?

A. Yes, sir.

Q. And what date did Mr. Goden appear again, preceding that Monday?

A. I don't remember that Mr. Goden appeared again after that transaction.

Q. I believe it is said he met you Friday night. Do you recall that?

A. Yes, that is right.

Q. Tell the jury what took place at that time. Where and all about it.

A. Our attorney, Mr. Hardy, and Mr. Hathaway, my partner, and myself, met Mr. Goden and Mr. Vick by mutual consent at the Osborne Hotel. We were asked up to Mr. Goden's room, and the conversation, if I

remember correctly, opened in this way: I asked Mr. Goden if he had come back with the money; he told us he hadn't.

COURT: He had not?

A. No, sir. And that the obstacles, one or two that they had in the office, if that is all there was they would waive it, but they had found counts, and that they had sent Mr. Goden back with instructions to replevin the cars. At that time I didn't know exactly what replevin was. They replevined the cars.

Q. What did he say he would give you?

A. Mr. Goden asked us, through our attorney, Mr. Hardy if—he said—he asked him if he had—he offered us 85 per cent.

Q. Well did he offer that or ask if you would accept it?

A. He asked us if we would accept it if it was offered, and Mr. Hardy, our attorney, when asked him if—words to the effect, if I remember correctly, if they wanted us to relinquish our claim on our bonus money and our contract deposit money. Mr. Goden replied that all he had authority to do was to advance this 85 per cent of this retail value.

Q. What was then said?

A. Mr. Goden then asked us—I believe the next thing in the line of succession was that Mr. Goden asked us if we would accept this money if it were tendered, and our attorney, Mr. Hardy told him that we would take it under advisement. I distinctly remember Mr. Goden at that time saying that the offer was withdrawn then and there, and as Mr. Hardy repeated—Mr. Hardy

has told you before, Mr. Goden repeated again in the hallway, the offer was withdrawn.

Q. Did you see him any more after that with respect to this matter?

A. I believe the next time that we saw Mr. Goden was at the time that the cars were replevined by the United States marshal.

Q. Did Mr. Goden or any one else ever tender you either cash, check or draft, or anything else for this money?

A. No, sir.

Q. Or any money?

A. No, sir.

Q. And did he or any one else make any demand on you for the cars?

A. No, sir

Q. Now, did you meet Mr. McDougall the morning that the Marshal took the cars?

A. Yes, sir.

Q. Do you recall whether Mr. McDougall made any demand at that time, or whether the Marshal simply took the cars under the writ?

A. I don't remember Mr. McDougall ever making any demand for the cars any more than through this Marshal. They came in all together and we were merely introduced around and were told that the cars were replevined by the United States Marshal, and he proceeded to read his documents.

Q. Now, Mr. Winchell, state to the jury how much you had paid for each of these cars.

A. We paid for these cars last year \$390.00—I forget just what the figures are.

Q. You can look at the invoice and refresh your memory as to the exact amount paid.

A. \$390.00 less 15 per cent plus \$53.25 freight; that is the price at Detroit, less our commission plus the freight to Eugene.

Q. Now, was there any further sum for you to pay the Ford Motor Car Company for these cars?

A. No, sir.

Q. And you paid for them at the time they were delivered?

A. Yes, sir.

Q. Did you ever pay any other price to the Ford Motor Company than the price you paid upon delivery?

A. No, sir.

Q. You were the agents for the Ford Motor Car Company in 1913, handling their cars from 1913 to 1914?

A. That is 1913-'14.

Q. During that year did you ever send any other money back to the company than you paid when the cars were delivered?

A. No, sir.

Q. And you handled Ford cars from 1914-'15?

A. Yes.

Q. Did you ever send any money back to the Ford Motor Car Company other than the price you paid upon delivery?

A. No, sir. That is pertaining to cars; outside of parts now.

Q. Yes. From 1915 to 1916 did you ever pay any further price than the price they were invoiced to you at?

A. No, sir.

Q. And you received the cars?

A. Yes, sir.

Q. And sold them in the course of business?

A. Yes, sir.

Q. What was your profit per car during the season beginning August 1st, 1915, to August 1st, 1916?

A. Our profit was 15 per cent of the advertised price, at Detroit—advertised by the Ford Motor Car Company, plus a graduated bonus which was very necessary.

Q. You added to the price you paid the Ford Motor Car Company your profit, did you?

A. Yes, sir.

Q. And received that from the customer?

A. Yes, sir.

Q. And kept the money?

A. Yes, sir.

Q. And if you didn't sell the car you simply had the car on your hands?

A. Yes, sir.

Q. Did the Ford Motor Car Company take them back off you?

A. No, sir.

Q. There were thirty-six of these touring cars, were there?

A. Yes, sir.

Q. And one Sedan?

A. Yes, sir.

Q. What did you pay for the Sedan?

A. Have you the bill there?

Q. I will ask you if the Sedan is invoiced on this paper I now hand you?

A. Yes, there is a carload of six touring cars, 56-inch tread; one Sedan, 56-inch tread; \$925.00 for the Sedan, less 15 per cent.

Q. What was the net price to you of the Sedan?

A. \$786.00 at Detroit. Now, I can't remember what the freight was.

Q. Plus the freight?

A. Plus the freight, yes, \$786.25.

Q. This is the Sedan mentioned here that they took away from you in the replevin action?

A. Yes, sir.

Q. Dated, 1915?

A. Yes, sir.

Q. And you had had this on hand ever since and been unable to sell it, had you?

A. Yes, sir.

Q. What is the fact as to whether in the meantime the Ford Motor Car Company had reduced its retail price on the Sedan?

A. We still owned the Sedan.

Q. Afterwards they reduced the price on them to the public?

A. They reduced no price to us.

Q. Have they to the public?

A. Yes, they have.

Q. But you were stuck for the same old price?

A. Yes, sir.

Q. And had the car on your hands at the time they took it away from you?

A. Yes, sir.

MR. HARDY: I will offer this sheet in evidence, showing the Sedan which is in evidence in this case.

Marked DEFENDANTS' EXHIBIT G and read as follows:

Ford Motor Company, Portland Branch, 8/27/15.
Sold to Eugene Ford Auto Company,
Eugene, Oregon.

Factory stock.

Date shipped, 8/27/15.

First National Bank.

Terms, net cash.

6 Touring cars, 56-inch tread.....	\$2640.00
1 Sedan, 56-inch tread.....	925.00

\$3565.00

Less 15 per cent.....	534.75
-----------------------	--------

\$3030.25

Proportional freight Detroit to Portland....	300.17
--	--------

Speedometers	42.00
--------------------	-------

658934 Sedan

257276

858647

858893

859655

859662

859665 “

Q. That was paid for, was it?

A. Yes, sir.

Q. Now, Mr. Winchell, the pleadings show you had thirty-six touring cars on hand, and one Sedan, at the time the United States Marshal took the cars under writ of replevin?

A. Yes, sir, that is the Sedan that is mentioned there.

Q. Now, you have paid for these cars, it is admitted, a total of \$16,077.50. Is that right?

A. Yes, sir.

Q. Was there any further sum remaining to be paid for these cars?

A. No, sir.

Q. Nothing whatever in any way, shape or form?

A. No, sir.

Q. Now, can you tell the jury the number of cars that you had sold from August 1st, 1915, up to the time this action was commenced,—that you had purchased rather from the Ford Motor Car Company?

A. Why, Mr. Hathaway made a report of that.

Q. I have a memorandum in my hand which says 179 cars. Can you state whether or not that is correct?

A. Yes, sir.

Q. You know that is correct, do you?

A. That is taken from our books, yes, sir.

Q. That includes the thirty-six touring cars and the Sedan?

A. Yes, sir.

Q. Now, as I understand it, the price at which you sold these cars was \$493.25?

A. \$493.25.

Q. For each of the touring cars?

A. Yes, sir.

A. At what price could you sell these cars?

A. \$493.25.

Q. And you were carrying on your business in the usual course, were you?

A. Yes, sir.

Q. At the time the cars were taken?

A. Yes, sir.

Q. And you had prospects?

A. Yes, sir.

Q. Selling cars right along?

A. Yes, sir.

Q. State to the jury what the fact is as to whether or not in the ordinary course of your business, from the time these cars were taken up to the first of August you could have sold these thirty-six touring cars at that price to the public.

A. Well, the best way that I can state that to the jury would be that at the time we were interfered with by the Ford Motor Car Company, it took away from us the two best months of the year, two best selling months, the height of the automobile selling season, June and July. Our contract ran from August to August. Another thing to substantiate that fact is the amount of business that Vick Brothers did at that same station from the time we were practically thrown out. They sold—

MR. McDOUGAL: If the Court please, I object to any testimony as to what Vick Brothers did.

Q. State whether or not you could have sold the cars in the ordinary course of business at that time.

A. We certainly could, yes, sir.

Q. And as I understand it, the selling price of the Sedan was \$983.25. Is that right?

A. I think so.

Q. That is, I mean you would sell it to the public?

A. Yes, sir.

Q. Now, if including these cars you purchased 179 cars, as a mathematical proposition you had sold during the year 179, less 37. Is that right?

A. Yes.

Q. Or 142 cars that you had sold during the year.

A. That is in our territory.

Q. Now, who fixes the selling price of these cars?

A. The Ford Motor Company.

Q. The plaintiff in this case?

A. Yes, sir.

Q. And they dictate to you the price at which you should sell the cars?

A. Yes, sir.

Q. And they fix the value then, at Eugene, of \$493.25 for a touring car?

A. Yes, sir.

Q. And \$983.25 for a Sedan?

A. Yes, sir.

Q. And you were supposed to be content with that profit?

A. Yes, sir.

Q. Now, since the company took the cars, have you been out of business?

A. Yes, sir.

Q. Just been waiting there at Eugene until this matter was disposed of?

A. Yes, sir.

Q. Were you able to engage in any other business during this interim?

A. Lack of funds. Our money is tied up.

Q. You have never received a dollar from the Ford Motor Car Company, have you?

A. No, sir.

Q. They have never put the money in front of you where you could get it?

A. No, sir.

Q. If you wanted it, now, what kind of business—tell the jury what kind of business you were doing there. What was your average profit, outside of the price of the cars, running the garage and selling parts and gasoline and oil?

A. Well, the profit varies, but I should think—

Q. What would it average?

A. (Continuing) that a fair average of our profit would be a third—30% on the garage business. The cars are 15%, but we were enjoying a very nice business. Naturally our being the Ford agents there we corral practically the most of the Ford business.

Q. What did it amount to a month, on the garage business?

A. Oh, I haven't—

Q. Just approximately.

A. Approximately \$300.00.

Q. \$300.00 a month?

A. Yes, sir.

Q. That was selling what?

A. That is the parts and accessories, gas and oil, and stuff of that kind.

Q. That wasn't involved in the Ford contract at all?

A. No, sir.

Q. And how many automobiles were you to take from the first of August, 1915, to the first of August, 1916?

A. 286.

Q. And you would have had your profit on each of those cars?

A. Yes, sir.

Q. That would be 15% on every car?

A. Yes, sir.

Q. How many did you sell from the first of August, 1914, to the first of August, 1915? Would 161 be about right?

A. I think that was the amount, yes, sir. Mr. Hathaway took that off the books.

Q. I have a memorandum here from the first of August, 1913, to the first of August, 1914, 88 cars.

A. Yes, sir.

Q. What is the fact as to whether or not the business was increasing in that proportion? About doubling each year?

A. Yes, sir.

Q. Now, one of the witnesses has testified that after this case was commenced, and after the cars were taken, somebody has gone into the First National Bank of

Eugene and paid some debt of yours there. Did you ever authorize any one to do that?

A. No, sir, I didn't know of that being done.

Q. Was it done with even your knowledge?

A. No, sir.

Q. Long after the action was commenced and your answer filed?

A. Yes, sir.

Q. In this case. Now, have you ever received the five per cent additional bonus on the 179 cars?

A. No, sir.

Q. I believe you testified that Mr. Goden agreed that they would give you that?

A. Yes, sir.

Q. So that as a total you would be entitled to 20% on 179 cars, 15% plus 5% bonus?

A. Yes, sir.

Q. And you have never received the \$800.00 of your money that the company has?

A. No, sir.

Q. Tell the jury what kind of a building you had in Eugene, where it was located, the size of it.

A. Our building was—our floor space was, I think, 50 feet wide by about—oh, I don't know the depth—95 or 100 feet deep, three blocks from the main street there; it was a concrete building.

Q. Now, I wish you would tell the jury whether or not your business was decreasing or increasing.

A. Our business had been on the increase ever since we had taken hold of it.

Q. And all your capital is invested in these cars, and you haven't received it. Is that correct?

A. Yes, sir.

Q. Now, when the Ford Motor Car Company took possession of these cars under the writ of replevin, that was after you had agreed to, or had a tentative agreement to sell out the other business to Vick Brothers?

A. Yes, sir.

Q. When the Ford Motor Car Company took all these cars that you had bought and paid for, who since then has had possession of the gasoline and garage business?

A. Vick Brothers of Salem.

Q. The whole business has been taken away from you?

A. Yes, sir.

Q. And you have been turned out of the building itself, have you?

A. Yes, sir.

Q. Now, in your answer you claim the value of these cars, these thirty-six touring cars to be at \$493.25 each.

A. Yes, sir.

Q. And the Sedan at \$983.25?

A. Yes, sir.

Q. And none of that money you have received at all?

A. No, sir.

Q. And in addition to that there is your \$800.00?

A. Bonus money.

Q. No, deposit money.

A. Contract deposit money.

Q. And the 5% bonus on the amount of thirty-six touring cars at \$493.25, and the Sedan at \$983.25?

A. Yes, less a partial payment probably six months ago, some time ago, on this bonus money.

Q. That is six months ago you received some bonus money?

A. Yes, sir.

Q. And when you and Mr. Goden figured up the bonus money that he said he would get you, what did you figure it up at, at that time?

A. I can't give the exact amount.

Q. You can get that, can you? You have a memorandum?

A. Yes, we have a memorandum.

Q. All right, I wont ask at the present time. And in addition to that is your \$800.00?

A. Yes, sir.

Q. Besides the money you paid for the cars?

A. Yes, sir.

CROSS EXAMINATION

Questions by Mr. McDougal: Mr. Winchell, what territory did you have down there, with headquarters at Eugene?

A. Lane County with the exception of a little strip over on the coast.

Q. And you were to sell how many cars, or rather you did sell how many cars up to the time of the instituting of this action, in that territory?

A. I believe our record shows 174 there, isn't it?

Q. And you received 15% of the list price on the sale of all of those cars?

A. Yes, sir.

Q. Were any of those 174 cars or 142 cars—I think you have testified—were any of those cars sold by sub-agents under you?

A. Yes, there is a certain amount of these cars that went through our sub-agents.

Q. How many sub-agents did you have under your agency?

A. One, two, three, four—three.

Q. Which is it?

A. Three.

Q. How many of these 142 cars did these sub-dealers sell?

A. I can't tell you that.

Q. Can you estimate it?

A. Not without referring to our records.

Q. Well, will you look it up later on and find out, so you can tell me?

A. Yes, sir.

Q. Would you get straight 15% commission on these cars that were sold by your sub-agents?

A. We got the bonus money.

Q. Well, would you? Just answer the question; then you can explain it. Yes or no?

A. Will you put your question again, please?

Q. (Read as follows:) Would you get straight 15% commission on these cars that were sold by your sub-agents?

A. No.

Q. Now, you said something about bonus. What do you mean by that?

A. That is a profit that we get on volume of business. A graduated commission that we get on volume of business. From one to ten thousand, I believe was one per cent. From ten to twenty, two per cent. Our business exceeded fifty thousand dollars. We were in the five per cent class. We were entitled to five per cent bonus—five per cent extra profit.

MR. HARDY: You mean that a year, don't you?

A. Yes, during the year; during our contract.

Q. Had you arrived at the stage of receiving a five per cent bonus down there at Eugene at the time this action was brought?

A. Yes, sir.

Q. You had sold enough cars and the volume of business was great enough to entitle you to this five per cent additional bonus?

A. Yes, sir.

Q. What per cent if any of this bonus would your sub-agents get?

A. They got a graduated bonus as well as we did.

Q. Would that cut down your five per cent?

A. If they had reached the minimum amount it would, yes.

Q. Do you recall whether any of your sub-agents had reached that amount?

A. Yes, Mr. Goden, and ourselves figured with Mr. Vick; figured on this bonus money, and figured the amount of money that some of the agents would get—that they hadn't received, but we conceded that they probably would receive so much money before the year was out, and we figured that, the three of us, when this arrangement was made with Mr. Goden.

COURT: What was the amount of bonus that you figured would come to you?

A. If I remember correctly we figured our gross business for the year, up to the date, something about—over fifty-six thousand dollars.

COURT: How much was the bonus that would come to you?

A. That would be—

COURT: No, you said part of it went to sub-agents.

A. Well, that isn't clear in my mind. There was one of them—I believe we figured that Junction City would receive—would be in the hundred-dollar class.

MR. HARDY: We can show that by Mr. Hathaway, your Honor; he was more the bookkeeper of the firm.

A. Mr. Hathaway was the bookkeeper and had that all.

Q. I will wait then until Mr. Hathaway is on the stand. Now, Mr. Winchell, how long did you say you had been agents for the Ford Motor Car Company?

A. We were on our third year for the Ford Motor Company.

Q. And your garage was down there in Eugene?

A. Yes, sir.

Q. You had an established business?

A. Yes, sir.

Q. Did you own your garage?

A. No, sir.

Q. Or did you lease it?

A. What do you mean, own the building?

Q. Yes.

A. No, we didn't own the building.

Q. Did you lease it?

A. Yes, sir.

Q. Did you have a written lease?

A. No, sir.

Q. Month to month?

A. Yes, sir.

Q. How much rent did you pay?

A. \$55.00 a month.

Q. When Mr. Goden came down the first time to see you right after the telegram was received—or was the telegram received about the time the registered letter was received?

A. No, we received the telegram first and then Mr. Goden appeared on the scene.

Q. He appeared after the telegram?

A. Yes, sir.

Q. What was the subject of his conversation at that time?

A. The subject of the conversation was that Mr. Goden had been instructed by the management at Portland to come there and fix the matter up; he says "You no doubt know what it is." I told him yes, we had received this telegram. Well, he says, "What are you going to do about it?" and we said "You might figure the contract is cancelled. We don't figure it is. We are satisfied. We are doing a good business." Mr. Goden said that he expected that we would take that attitude, but that he thought it was a great deal better to settle the thing his way. That he had a letter to come down there and settle it, use discretion, and that after

our hearing what he had to say, or words to that effect, that we would probably think different about it. That we could go to court if we liked, but the Ford Motor Company was a very large concern and they would probably take it to a higher court and keep it in the courts indefinitely, and then he told us what he proposed to do, and went on as I have related before; that Vick Brothers stood ready to come in and take all our stock and accessories, fixtures, everything, dollar for dollar for what we paid for them, and that the Ford Motor Company would give us our contract deposit money and our bonus money, every cent that was coming to us, which we accepted, the following day, with the condition that they were to give us this cash as I spoke of before; and Mr. Goden went to Portland, and when he came back, and I asked him if he had the cash, he told us no, that he had come down there with instructions from Portland to replevin the cars.

Q. Mr. Winchell, you said, I believe, on your direct examination, that you expected the contract to be cancelled. Why did you say that?

A. Because we had a telegram to the effect that the contract was cancelled.

Q. I know, but you said you had expected a telegram cancelling the contract. Why was that?

A. I didn't make such a statement. If I did, I was mistaken.

MR. SMITH: After he got the telegram. The remark was to Goden, when Goden came down there.

Q. Mr. Winchell, what was the price at which you were to sell these cars?

A. \$493.25.

Q. And in that way you would get a commission of 15%.

A. Fifteen per cent of factory price; \$493.00, less freight.

Q. Did you sell each one of these cars at \$493.00?

A. Yes, sir.

Q. You are absolutely sure of that?

A. Why, no, we didn't altogether.

Q. What cars did you not sell for \$493.25?

A. I am not prepared to say.

Q. Can you estimate how many you sold at less than \$493.00?

A. No, sir.

Q. Can you give me the names of any persons or companies to whom you sold cars at less than \$493.25?

A. I cannot.

Q. By selling the cars at less than \$493.25, of course you reduced your commission that much, didn't you?

A. We did business on that much less profit.

Q. And you are unable at this time to tell me how much, or how many cars at less than that price, and how much your profit was decreased on that account?

A. I am unprepared to give you that at this time.

Q. Can you tell by an examination of your books?

A. No, sir.

Q. You have no records to show that?

A. No, sir.

Q. Would you say that you sold twenty-five cars at less than \$493.25?

A. No, sir.

Q. Twenty?

A. No, sir.

Q. Fifteen?

A. No, sir.

Q. Ten?

A. No, sir.

Q. How many?

A. I can't say.

Q. When Mr. Goden came down there to see you with reference to the cancellation and settlement of this contract prior to the institution of the action, you say he returned to Portland, to report on the negotiations?

A. I presume he did. He told us he was going to Portland to get the money, yes, sir.

Q. Then he came back on the next — what day would that be—the next day?

A. I believe it was Monday.

Q. On the next Monday?

A. Yes, sir.

Q. And that was the time that the cars were replevined?

A. Yes, that following morning.

Q. Now, are you and Mr. Hathaway the owners of this garage at the present time?

A. Yes, sir.

Q. Didn't you sell the garage to Vick Brothers and receive a thousand dollars deposit on the sale?

A. We sold the garage to Vick Brothers with the understanding that we were to get our bonus money and our contract deposit money from the Ford Motor

Company, of which Vick Brothers have a receipt to that effect—subject to receipt of all contract deposit money and bonus money from the Ford Motor Company.

Q. Have you that receipt with you?

A. We haven't the receipt. Mr. Vick is in possession of that receipt.

Q. You haven't a copy of it?

A. No, sir.

Q. Now, Mr. Winchell, what was the consideration for the sale of this garage?

MR. SMITH: Objected to; not competent in this case; the deal between them and Vick Brothers was conditioned upon the closing of the deal between the Ford Company and them, and the deal between Ford Company and them was never closed, so it is immaterial, more than anything else.

MR. McDUGAL: If the Court please, this man claims he was damaged and his business ruined.

COURT: I think you have a right to inquire whether he sold the garage, and if so what he got for it.

Q. (Read) Mr. Winchell, what was the consideration for the sale of this garage?

A. You mean by that, the amount?

Q. Yes, what did you get for it?

A. Why, it was—I will have to refer to our records. It was in the neighborhood of two thousand for the part Vick Brothers were to take, wasn't it—eighteen hundred and something, if I remember correctly.

Q. Well, but if I understand it, Mr. Winchell, didn't Vick Brothers—you took an inventory of the stock, didn't you?

A. Yes, of the stock we had on hand at that time.

Q. Stuff you had on hand?

A. Outside of the cars.

Q. Then you turned it over to Vick Brothers dollar for dollar for what it cost you?

A. Yes, sir.

Q. That is all you did get?

A. Yes, sir.

Q. And you want the jury to understand that you were selling out a business that was paying you fellows net \$300.00 a month, dollar for dollar?

A. We got nothing for our business; we merely sold the stock and fixtures, merchandise we had on hand, accessories and stuff of that kind.

Q. What were you going to do with your business? You say you got nothing for the business.

A. I don't quite understand.

Q. You say you got nothing for the business. Did you give them the business in addition to the stock that they took over?

A. Yes, with a view of going into something else.

Q. You just threw that in with the stock?

A. Yes, sir.

Q. Now, at the time you entered into this contract with the Ford Motory Company, you recall reading it over, do you—knowing the contents of it?

A. No, sir, I had faith enough in Henry Ford at that time to sign it without reading it.

Q. You signed the contract without reading it?

A. Yes, sir, didn't understand it.

Q. You signed a contract for three years and didn't read it?

A. No, sir, never read it very—clear through until we got into difficulties.

Q. Here is paragraph 48: "This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect." Didn't you know that clause was in there?

A. I have read the contract at different times, different places. I don't remember. I have since we have gotten into legal difficulties. I have read the contract clear through.

Q. Did you sell any other cars down there than the Ford cars?

A. Yes, sir.

Q. What kind of cars did you sell?

A. Dodge cars.

Q. Were you selling the Dodge cars at the time this action was instituted?

A. No, sir.

Q. How long prior to that had you ceased selling Dodge cars?

A. The expiration of our last contract.

Q. When was that?

A. I can't say; several months.

Q. Several months?

A. Several months ago.

Q. You were simply handling the Ford Company's automobiles—selling Ford automobiles for the company and taking care of the service of the Ford Company?

A. Yes, sir.

Q. And the contract, you understood, according to paragraph 48, could have been cancelled at any time. You knew that?

A. No, I didn't at that time.

Q. Now, you say that you had never paid any further sum on the cars than 85 per cent of the list price, that you customarily paid when the cars were consigned to you. Is that right?

A. Yes, sir.

Q. Do you know whether or not under your contract you might not pay a 10 per cent additional in the event that you cancelled, or sold and obtained title to these cars?

A. Did I want?

Q. Read.

A. I didn't know that, no.

Q. This suit was instituted about the 5th of June, was it not—third of June? Have you and your partner, Mr. Hathaway, made any attempt or endeavor to run a garage down there at Eugene?

A. Not at Eugene; we have made attempts to secure other agencies in which we have been hampered by the want of money.

Q. Because of the fact that this money is tied up in this suit?

A. Yes, sir.

Q. How much actual money did you have tied up in these cars, of your own?

A. I can't answer that question. I don't know. I will have to refer to it.

Q. Well, did you pay for these thirty-seven cars in cash, out of your own funds?

MR. SMITH: That is wholly immaterial, if the court please, in the first place, and in the second place, if borrowed from the bank, it was their own funds; whatever they borrowed from the bank was their own money; the bank owned the notes and they owned the money.

COURT: Competent on the question of damages.

Q. Read.

A. I hardly know how to answer that question.

Q. Well, as a matter of fact, Mr. Winchell, haven't you and your partner been doing business on a shoe-string down there as a company—on credit?

A. I don't exactly understand you.

Q. Haven't you been borrowing money regularly to pay for these cars instead of using your own money?

A. We have used all of our own money and have borrowed money, yes. We have had a good credit.

Q. Well, in the last three years, or since December, 1913, haven't you borrowed an average of about five or six thousand dollars every three months?

A. I should think so, yes, or more.

Q. And this amount went towards payment for those cars?

A. Yes, sir.

Q. And you paid interest on this money at the rate of about eight per cent?

A. Yes, sir.

Q. That would necessarily go to the reducing of your profits, wouldn't it?

A. We always treated that as part of our overhead expense.

Q. Did you take that into consideration when figuring this \$300.00 net that you claimed this business was bringing in to you, a month?

A. I don't quite understand you.

Q. You have testified and sworn in your complaint that your business was bringing in a net profit of \$300.00 a month.

A. Approximately.

Q. Approximately. Did you take into consideration the expense of paying interest on these loans in figuring that, or did you leave that out?

A. That wasn't the part of the business that incurred it.

Q. Beg pardon?

A. That wasn't the part of the business that incurred the interest expense. It was the carrying of the automobiles that caused us to borrow money.

Q. Now, Mr. Winchell, were you there when this inventory was taken with Mr. Vick and with Mr. Goden?

A. I was there, yes, sir.

Q. Do you recall whether you checked out short of a great number of parts, or not?

A. I had nothing to do with taking the stock. Mr. Hathaway and Mr. Vick took the stock.

Q. Well, do you recall whether you were short any parts?

A. Short in what way?

Q. Well, say there would be extras on the cars missing, for instance, the head-lights? Do you remember about two dozen head-lights being short on the cars?

A. I remember, yes, a few head-lights and a fender or two we had taken from the cars before they had been assembled, to accommodate a customer; we had sold them those.

Q. And of course the cars would have been depreciated that much in value, would they not?

A. To that extent until it had been replaced. (To jury). You understand what he asked? We got those cars shipped to us all knocked down, and if a customer would come in and want a head-light, if we didn't happen to have head-lights in stock in the parts room, this parts or lights he speaks of happened to be out, before they were assembled, rather than have a customer go away dissatisfied we would give him one of these lights. It didn't make any difference whether in the stock room or in the back room. They were all our property, and we sold them a light.

Q. Referring again, Mr. Winchell, to these cars which you say you sold for less than \$493.25, didn't you sign a contract here providing you would sell these cars for \$493.25?

MR. HARDY: I object to that; the contract is the best evidence of its contents.

COURT: I suppose the contract speaks for itself.

MR. HARDY: He signed the contract; that is admitted.

Q. Now, Mr. Winchell, with reference to Mr. Goden's visit down to Eugene, he asked you to come over to the bank and get the money on these cars, didn't he?

A. I don't remember Mr. Goden asking me to come over to the bank.

Q. What did he say?

A. Mr. Goden said that he was prepared to come down and replevin these cars, or would we, if he offered us a check for the amount of these cars at Detroit less 15 per cent, would we accept it, and our attorney replied that we would take it under advisement, at which time Mr. Goden told him that the offer was withdrawn.

Q. Previous to that time had Mr. Goden offered to take you to the bank and get you this money?

A. No, sir.

Q. Your intention was not to take this money in any event unless the matter of the bonus was settled up, and the other matters, was it not?

A. That was the idea, yes, sir.

Q. So that if Mr. Goden had not settled up the bonus matter and the other claims that you had, the deposit money and claims of that nature, if he had offered you the money you would not have taken it, would you?

MR. SMITH: Objected to as incompetent, ir-

relevant and immaterial. Nothing to do with this case at present as it stands now.

COURT: I think the objection is well taken.

RE-DIRECT EXAMINATION

Questions by Mr. Hardy: Did they tell you that the reason they had cancelled the contract was because you had sold one or two cars for less than \$493.25?

A. No, sir.

Q. Did they intimate that was the reason they were taking the cars away from you?

A. No, sir.

Q. Mr. Winchell, it has been intimated or suggested that you sold the garage business to Vick Brothers. Was that deal completed when these cars were taken—with Vick Brothers. Did you ever get your money from Vick Brothers? Did they ever pay you up?

A. No, sir.

Q. What is the fact as to whether that was made part of the sale to the Ford Motor Car Company?

A. I understand it as such.

Q. That is on the Goden deal?

A. Yes.

Q. That they backed out of afterwards?

A. Yes, sir.

Q. And you have a case pending in Lane County that Vick Brothers brought?

A. Yes, sir.

Q. And that is not disposed of or settled?

A. No, sir.

Q. You were asked if you didn't have the agency for the Dodge cars. What is the fact as to whether or not the Ford Motor Car Company forced you to give up the Dodge agency?

A. That was the reason we gave up the Dodge line, because the Ford Motor Car Company compelled us to do so.

Q. And after that you still went ahead on the Ford.

A. Yes, sir.

Q. For how long, before they took the cars away?

A. Pretty near a year, I guess.

RE-CROSS EXAMINATION

Questions by Mr. McDougall: When this Dodge contract was given up by you, wasn't it understood that you were to get a bonus on the Dodge cars sold down there?

MR. HARDY: What has that to do with this case?

MR. McDOUGALL: That goes to the question of damages.

MR. HARDY: All right, go ahead.

A. What is the question, please?

Q. When this Dodge contract was given up by you, wasn't it agreed between you and the Dodge Com-

pany you were to get a bonus out of the cars sold during the time of your contract?

A. Not with Dodge Brothers, no, sir.

Q. Well, the other agent? Did you get it from the other agent who took the contract with the Dodge Company over?

A. Yes, sir.

Q. Was that \$25.00 a car?

A. Yes, sir.

Witness excused.

F. M. Hathaway, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Hardy: Are you the other member of the firm of Winchell & Hathaway?

A. Yes, sir.

Q. Mr. Hathaway, Mr. Winchell looked out for the outside business in the sale of the cars, and you ran the office?

A. Well, we pulled together pretty well on that. I took more part in taking care of the office.

Q. Now, tell the jury what amount of this bonus money had been figured was due you at the time the cars were taken.

A. Between eighteen and nineteen hundred dollars, was the amount.

Q. Not less than eighteen hundred?

A. Yes, sir.

Q. And in addition to that the eight hundred that they had of your money?

A. The deposit money was still remaining due.

Q. Tell the jury the number of cars and the amount that you were to be paid for the cars.

A. There was thirty-six touring cars and one Sedan, and we were to be paid 85 per cent of the list price at Detroit.

Q. Well, you have it on your card there, the amount that you had paid for each of these cars?

A. We paid in the neighborhood of \$374.00 for the touring cars, \$331.50 for the runabout, and \$786.25 for the Sedan. Then there was the additional \$53.25 that we paid, freight from Detroit to Eugene. Also an additional five dollars extra on the Sedan; it cost a little more.

Q. What was the total you had paid for the cars?

A. I couldn't say the exact amount, but around sixteen thousand—

Q. \$16,077.50?

A. Yes, sir.

Q. The amount you had actually paid for the cars?

A. Yes, sir.

Q. State to the jury whether or not there was any further sum to be paid by you?

A. No, sir.

Q. Then when you sold the cars you got your profit?

A. Yes, sir.

Q. And if you didn't sell them you didn't get the profit. Is that right?

A. They remained ours.

Q. Were you in Eugene at the time this telegram was received that is in evidence?

A. Yes, sir.

Q. Did you see Mr. Goden when he came to Eugene at that time?

A. Yes, sir.

Q. Now, you tell the jury what Mr. Goden said to you and Winchell when he came at the time of the telegram.

A. If I remember correctly, Mr. Goden came in on Wednesday and he said he didn't know exactly what was up, but he had been ordered by the Ford Motor Company to come to Eugene. He was down in Southern Oregon, and he said though that he did know they was counting on cancelling our contract, but he was going to wait until he got further particulars. We had received a telegram to the effect—as it was read here awhile ago. Mr. Goden stayed there that night, and the next morning he mentioned to us that he expected a letter verifying this telegram; that our contract was cancelled and that he had Vick Brothers there to take over our stock and fixtures and take hold of the business.

Q. Now, did you and Mr. Goden come to any understanding as to how you would sell them?

A. We told Mr. Goden that we didn't consider our contract cancelled yet, and that we had a nice business there and we didn't care to go out of it. Well, he maintained that we would see that our contract was cancelled and we just as well begin negotiating some kind of a deal for straightening it out. So he mentioned, he

says, "I have always dealt fairly with you boys. I wish you would take my advice." He says, "I will tell you what I advise you to do because," he says, "you can't afford to resist this because the Ford Motor Company—the large capital they have behind them, they will carry this thing along in the various courts, and you will get off at the little end of the horn in the long run anyway." So we didn't know what to say or do, but he told me of a deal that he had put through up at La-Grande where the man—he told me how to get out of it easy, and that he didn't follow his advice with regard to it, and he afterwards admitted that he should have followed his advice with regard to it. So we told him that we would think it over, and we would let him know later what we thought about it.

Q. Well, did you and he finally come to any terms?

A. Well, the next morning—that evening Mr. Winchell and I talked it over and we was—well, we was undecided as to what to do. We didn't know where we were at. We felt that the Ford Motor Company would have the upper hand of us, and that we better do something, and we decided that night to accept their offer, provided they paid us back our full amount that we had invested in the cars, and that Vick Brothers took over our stock including parts and garage extras that we had for repairs, tools, and our accessories, typewriter, including a desk and various fixtures that we had, at the full retail price, that is, what we paid for them.

Q. What about the bonus money and contract money?

A. The bonus money was to be forthcoming from

the Ford Motor Company; it was understood that was to be paid to us on the volume of business that we had done up to that time.

Q. Including these cars in question?

A. Including the cars in question.

Q. What about the amount you had deposited with them? Did he agree to give you that?

A. Yes, sir, we had \$800.00 deposited.

Q. Did they keep that arrangement? Did they carry that out?

A. No, sir.

Q. Did Mr. Goden leave?

A. Well, we told Mr. Goden that upon the payment of that in cash that we would accept it, and that we couldn't consider anything else but a cash proposition; so he says that he could get the cash, and he says, "You leave it to me; I will go to Portland, and I will fix this up." So he left for Portland.

Q. And when he came back, what occurred? Tell the jury.

A. When he came back, I don't remember just how we met Mr. Goden, whether we talked to him over the phone or met him personally. Anyway we agreed to meet him at the Osborne Hotel Friday night.

Q. Who went to the hotel?

A. Well, Mr. Winchell and I, our attorney, Mr. Hardy, went to the hotel that evening, and met Mr. Goden and Mr. Vick in the lobby and we introduced each other all the way around, and Mr. Goden suggested that we go up to his room, so we did so, and Mr. Winchell asked Mr. Goden if he was ready to pay over the cash—

the money. Well, Mr. Goden said that he couldn't do that; that after interviewing the managers at Portland, why they had objected, but they had agreed to pay over the 85% list price of the cars in question on the cars that we had in stock at that time.

Q. What about the contract money and bonus money? Your own money that was deposited and your bonus money?

A. Well, he said that could be taken care of afterwards. He says "I can't say; you may just have to scrap that out with the Ford Motor Company, but I am prepared to pay the 85%."

Q. Well, what else was said?

A. Well, we told him that we couldn't consider a proposition of that kind; that we were entitled to our bonus money and also to our deposit, and he said, well he says, "I am only authorized to pay you the 85%," and he says "I have the authority, or have the money at the First National Bank, and can make you a check tomorrow morning."

Q. Do you recall then what I said?

A. Well, Mr. Hardy mentioned that we would take this under advisement, and immediately Mr. Goden mentioned that the deal was all off; well, Mr. Hardy says, "Then it is time for us to go. We will just simply take this under advisement." And we got out, half way to the door, and Mr. Goden repeated that.

Q. Repeated what?

A. That the deal was all off; when we got out to the elevator and was stepping in, and he followed out there, and Mr. Vick and Mr. Goden said that the deal was all off.

Q. What happened next after that?

A. Well, wait a minute now.

Q. The Marshal came and took the cars?

A. Well, the next day was Saturday and we didn't hear anything from anybody. I think that was Saturday.

Q. What happened Monday morning?

A. Well, Monday morning, shortly after I had opened the garage, in came Mr. McDougall, the man that testified here this morning, and a deputy United States Marshal, and also the Marshal himself, and mentioned the fact that these cars were now to be taken by the United States Court.

Q. The cars were replevined then?

A. And the cars—they began to tack on a notice on each car.

Q. Now, in the meantime, had Vick paid you for the other business?

A. We had invoiced the stock, and Vick Brothers had voluntarily paid us a thousand-dollar deposit; we in turn had given them a receipt, conditioned on that receipt that when everything was settled up with the Ford Motor Company, and we got our 85% value of the cars back and the deposit money and also the bonus money that we were entitled to, that then we would—

Q. Did the thousand dollars cover the sale of the other business to Vick Brothers, or was there still more to be paid by Vick Brothers?

A. Yes, there was in the neighborhood—the stock invoiced at about two thousand dollars, and you might say they had paid us half of that amount.

Q. What is the fact as to whether or not the sale

of Vick Brothers was conditioned and to be completed on fulfillment of the deal with Goden and the Ford Motor Car Company?

A. Yes, that was the condition.

Q. And that has not been done?

A. No, sir.

Q. And you are in litigation with Vick Brothers now, over the possession of that business?

A. Yes, sir.

Q. But you have been out of it until you can try your lawsuit, is that right?

A. Yes, sir.

Q. What do you say, Mr. Hathaway, as to the volume of business you were doing, first as to the number of cars you were selling each year—that you actually sold?

A. When we took over the business in October, 1913, we signed up for eighty cars; the previous agent had sold twenty-six the previous year. We sold eighty-eight cars the first year; the second year we signed up, I believe, for one hundred and forty-four cars, and if I remember correctly the Ford Motor Company considered that we sold one hundred and seventy-some-odd cars the second year. The third year when we were notified by telegram to come down and sign up for a new contract, the Ford Motor Car Company asked us to sign up for one hundred per cent more cars than we did the previous year. Well, we thought that was quite an undertaking, but we found out that had to be done or else we couldn't sign up, so it was the Ford Motor Company's estimate, and we just let it go at that and signed;

so we signed up for two hundred and eighty-eight cars.

Q. How many had you sold at the time of the replevin action?

A. The Ford Motor Car Company would consider that we sold 179 cars, because when you take the cars of the Ford Motor Company, they consider them sold.

Q. That is when you pay for them.

A. Yes, sir.

Q. That included these thirty-seven cars?

A. Yes, sir.

Q. When you take the cars from the Ford Motor Car Company and pay them, they figure that on your bonus, just as if you passed them out to the public, do they?

A. Yes, sir.

Q. That is they were sold as far as the Ford Motor Car Company is concerned.

A. That is the way.

Q. And fully paid for, as far as you are concerned?

A. Yes, sir.

Q. And if you don't sell them again yourself, that is your loss, is it?

A. They remain our property.

Q. In all the three years you dealt with them—

JUROR: I would like to ask if they have to sign a contract each year for these cars?

A. Yes, sir.

JUROR: The same old contract or a new form of contract?

A. Why, it is changed a little; it seems to be about the same thing.

Q. Have you ever read through and studied the language, and know the meaning of all the fine print in it?

A. No, sir.

Q. These forty-eight odd paragraphs?

A. No.

Q. Now, Mr. Hathaway, in all the years you have dealt with them has there ever been a time, a single instance, but what you have had to pay for the car on delivery, to you?

A. No, we only pay the one price.

Q. And you pay that on delivery of the car?

A. Yes.

Q. And you treat the car as yours and go on and sell it or dispose of it as you like?

A. Yes, sir.

Q. You have done that for three years?

A. Four years I was with the Ford Motor Company?

Q. You were their agent over in Eastern Oregon?

A. Yes, sir.

Q. Were you ever called upon to pay any further price than the price you pay on delivery?

A. No, sir.

Q. In all the 437 cars that you sold at Eugene, did you ever pay a cent extra over and above the price you were required to pay to get the cars?

A. No, sir.

Q. Were you ever asked to?

A. Never asked to.

Q. Did they ever claim anything different?

A. No, there was nothing.

Q. Now, you describe to the jury what kind of business you were doing there, whether it was an increasing or decreasing business, the character of the business.

A. Our business was on the increase from year to year, and increased according to the number of cars that we were selling; what I mean by that is that each and every car we sold, we sold more or less accessories on, and done more or less work for. As they would become old, why, we had to do various work for them—various kinds.

Q. What do you estimate that general business, outside of the sales of the cars, as to your profit?

A. We always figured that our business was paying—well, we thought conservatively three hundred a month—our garage end of the business.

Q. Then there was the profit on the cars besides?

A. Yes, sir.

Q. And you made 15% on the cars besides the bonus?

A. Yes.

Q. Now, you have been there doing business three years. What is the fact as to whether you had got pretty well acquainted in Lane County?

A. Well, Eugene is not a very large city, and we had opportunity of becoming very well acquainted, because we had an established business there, and were known all throughout the country mostly, with the exception of over on the coast.

Q. What would you say as to whether or not you had the good-will of the people up there—I know you are modest about it?

A. I would rather somebody else would say that. Why, I think we stood pretty well in the community.

Q. Please tell the jury what other offers you have had this summer to go into business?

MR. McDOUGALL: I object as incompetent, irrelevant and immaterial; that is objected to; it certainly would not tend to show damages in this case.

MR. HARDY: It would show we are tied up so we couldn't go into business. We could have gone in if we had had the money.

COURT: Ask if they did go into business, and if not, why not.

Q. Did you have any other opportunities to go into business this summer?

A. Well, Mr. Winchell and I—at this time when my mother drove over into Eastern Oregon, and when we arrived at Pendleton, Mr. Simpson, of the Ford Motor Company there, their representative, told us there was a man there waiting us at the hotel, for a couple of days—

Q. Just tell what the offers were. Don't go into all the details.

A. He wanted to offer us the Studebaker line. Then when we got over to Walla Walla we had an opportunity to take on the Buick line there, but on account of lack of funds, our funds being tied up, we were not able to do anything.

Q. Your money being tied up in these Ford cars?

A. Yes, sir.

MR. McDOUGALL: Will the court allow an exception to my objection?

COURT: Yes.

Q. So you have not been able to go into any business on account of your capital being tied up in this manner?

A. Until we get our money.

CROSS EXAMINATION.

Questions by Mr. McDougall: Mr. Hathaway, you say you figure you made approximately \$300.00 per month net on this business of yours down in Lane County—in Eugene?

A. Yes, sir.

Q. And how was this money made? From the fact that you were the Ford agents down there?

A. Why, I should say yes; and then we were in business there and we were selling gasoline, lubricating oil, tires and accessories; doing repair work.

COURT: What do you mean by accessories?

A. Accessories like speedometers and bumpers.

COURT: For cars other than the Ford?

A. Yes, although we specialized a great deal on the Ford cars.

Q. Now, you say in your answer here in which you are asking damages, that you were put out of business after this action was instituted?

A. Yes, sir.

Q. This action was instituted on June 3, 1916, was it not?

A. Monday. Is that Monday?

Q. Yes.

MR. SMITH: No, June 3rd was Saturday; June 5th was Monday.

Q. That is when the cars were taken from you, and you claim that your business was ruined by the acts alone of the Ford Motor Company in going down there and taking these cars away, do you not?

A. It certainly was.

Q. And for that you ask to hold them responsible in this case?

A. We do.

Q. Is it not a fact that you have set up the same claims in a case which Vick Brothers have brought against you, enjoining you from interfering with their business down there?

A. I don't get your meaning.

Q. (Read as follows: Is it not a fact that you have set up the same claim in a case which Vick Brothers have brought against you, enjoining you from interfering with their business down there?)

A. I suppose in a way that would be considered so.

Q. You have filed an answer down in Lane County in the suit of E. C. Simmons, Charles H. Vick and George F. Vick, partners doing business under the name and style of Vick Brothers vs. V. W. Winchell and F. M. Hathaway, partners doing business under the name and style of Eugene Ford Auto Company, defendants, in which you alleged, didn't you, that George F. Vick entered your premises and undertook to interfere with defendants—that would be Winchell & Hathaway—“in the use of the telephone in the office of said business,

and made an assault upon these defendants, and defendants ordered him from the premises and he departed from the premises and forthwith commenced this suit. That defendants are the owners and entitled to possession of said premises and the whole thereof, and of the said business and of all the property described in the complaint and herein described; and plaintiffs"—that is Vick Brothers—"wrongfully asserted a claim to have some right therein, the exact nature of which defendants"—that would be you—"do not know, and have commenced this suit for the purpose of harassing these defendants"—that would be you—"and annoying them in the conduct of their business; and for the purpose of causing them trouble and expense in the conduct thereof, and for the purpose of seeking to drive them out of said business." Now, that answer was signed V. W. Winchell on the 13th day of June, a week after you claim that the Ford Motor Company put you out of business. Is that not true? Do you remember that?

A. Yes, sir.

Q. Can you reconcile your sworn answer in that case with the statement you have just made to this jury that the Ford Motor Company were absolutely responsible for the destruction of your business?

A. I would answer it in this way: That the Ford Motor Company stopped us from carrying out our deal with Vick Brothers and of course we interfered with having Vick Brothers come in and take that proposition at all until this other was settled, and I guess we interfered enough that it caused Vick Brothers and Simmons

to bring an action against us. Well, of course we had to answer in that action.

Q. How much did you sell this business that you claim was worth \$25,000 to Vick Brothers for?

A. You must understand that we were forced out of business.

Q. Never mind; just answer the question.

MR. SMITH: He is answering in his own way.

MR. McDOUGALL: No, he has not answered it at all.

Q. (Read.)

MR. SMITH: He says they were forced out of business.

A. Forced out of business and we—

COURT: What did you sell it to Vick Brothers for? What did they agree to give you for it?

A. They agreed to give us the invoice price on everything.

Q. And you agreed to accept that?

A. We had to.

Q. Now, do you remember what the invoice price of the parts were?

A. The full amount—and fixtures and all—between eighteen hundred and two thousand dollars.

Q. And did you receive anything as part payment on that?

A. We received one thousand dollars.

Q. And have you got that money yet?

A. Yes, sir.

Q. When these parts were checked over, do you

recall whether you were short some \$202.57 worth of parts?

A. I remember that I told Mr. Simmons or Mr. Vick—I don't know which it was—that we had taken a few parts from this stock of cars that we had, in order to accommodate people who might come in—when they damaged a fender or say a lamp—and we would just simply take it from our stock of cars and replace it by ordering from the Ford Motor Company. There was a little shortage there. I don't know just exactly the amount; didn't amount to a great deal.

Q. Now, you say that when Mr. Goden was down to Eugene, you talked over and discussed the matter of adjusting this contract, and Mr. Goden left you with the statement or the substance was to the effect that you should leave it to him and he would go to Portland and fix it all right?

A. Mr. Goden said, "I have always played fair with you boys, and you just leave it to me."

Q. And you understood he was coming up to Portland and see the manager?

A. Yes, sir.

Q. Then when he came back from Portland, what did he inform you as to the manager's position in the matter?

A. He objected.

Q. And what did he say they would do?

A. They would pay us the 85 per cent of the selling price or list price of the Ford cars—these cars that were in question.

COURT: That is they would return to you the money you had paid on the cars—was that it?

A. Yes, sir.

Q. And you refused to accept that?

A. Yes, sir.

Q. How many cars did you sell yourself, exclusive of the sub-agents in your territory, during the life of this contract, which terminated in the fall of 1916?

A. I couldn't say the number of cars.

Q. Well, can you estimate approximately?

A. No, I can't really tell you just exactly the amount.

Q. Did you look it up in the books here when I asked your partner the question?

A. No, I didn't.

Q. Can you find it now. How do you base your gross, or rather your net profits in this business without knowing something about that?

A. Well, on the volume of the business.

COURT: You sold during the year, or there were sold through your agency 179 cars, I understand?

A. Yes, sir.

COURT: How many of those 179 cars were sold by sub-agents? You had three sub-agents, didn't you?

A. Three sub-agents, yes, sir.

COURT: Now, how many of those 179 cars did they sell?

A. I believe that Junction City sold in the neighborhood of fifteen cars; Creswell sold eight or ten—let me ask again. Is this for the '15 contract or the last?

Q. The one that terminates August of this year.

A. Cottage Grove has sold somewhere around fifteen cars, fourteen or fifteen.

COURT: That is about thirty-nine.

Q. What about Springfield? Didn't you have an agent at Springfield.

A. Springfield sold one or two cars.

Q. Then you really had four sub-agents instead of three?

A. Yes, he had a contract but he said he didn't have the money so we just ran a car over to Springfield, only three miles, and left it with him, and when he sold it, he came over and got another one.

MR. McDOUGALL: If the court please, I have a certified copy of the answer in this case of Simmons et al. vs. Winchell et al., which I desire to introduce in evidence here. Copy of the complaint and answer.

Marked PLAINTIFF'S EXHIBIT 4.

IN THE CIRCUIT COURT OF THE STATE
OF OREGON FOR LANE COUNTY.

E. C. Simmons, Charles H. Vick, and Geo.

F. Vick, partners doing business under
the name and style of Vick Bros.,

Plaintiffs.

vs.

V. W. Winchell and F. M. Hathaway, part-
ners doing business under the name and
style of Eugene Ford Auto Co.,

Defendants.

COMPLAINT.

Plaintiffs for cause of suit against the defendants allege the following facts, to-wit:

That the plaintiffs are now and were at all times mentioned herein partners doing business under the name and style of Vick Bros., and have duly registered their assumed business name with the county clerk of Lane County, Oregon.

That the defendants are now and were at all times mentioned herein, partners doing business under the firm name and style of Eugene Ford Auto Co.

That on May 29, 1916, plaintiffs and defendants entered into a contract whereby plaintiffs agreed to purchase from defendants, and defendants agreed to sell to plaintiffs, all cars, fixtures, accessories and parts of the Eugene Ford Auto Co.; stock, fixtures and parts being of the invoiced value of \$1825; cars consisting of 36 Ford Touring cars of the value of \$423.25 and 1 Sedan of the value of \$649.00, and the plaintiffs agreed to pay and the defendants agreed to accept the sum of \$1825.00 for the stock, fixtures, and parts, and \$423.25 for each of the 36 Ford Touring cars, and \$649.00 for the Sedan, and defendants were to give plaintiffs possession of the building at 275 Eighth Avenue West, in Eugene, Lane County, Oregon, with the further understanding and agreement that the above mentioned understanding and agreement was not to be binding unless the Ford Motor Co. paid the Eugene Ford Auto Co. all bonus money due them and returned the contract deposit money that the defendants had given the Ford Auto Co. and that

the said sale was subject to the said condition that the Ford Auto Co. perform as above set forth.

That in pursuance of said agreement and in compliance therewith plaintiffs as part of the said purchase money paid to the defendants the sum of One Thousand Dollars and defendants immediately gave the plaintiffs possession of all of the above mentioned property and gave plaintiffs the key, and gave plaintiffs possession of the building where they were at that time doing business, to-wit: at 275 Eighth Avenue West, in Eugene, Lane County, Oregon, and plaintiffs were to pay the balance of the purchase money as soon as the defendants demanded the same, and defendants have never demanded the payment of the same, but plaintiffs have tendered the balance of the money to the defendants and defendants have refused to accept the same and informed plaintiffs that the defendants and the Ford Auto Co. were unable to reach a satisfactory agreement and they do not want the balance of the said money until the defendants and the Ford Auto Co. reach a satisfactory agreement.

That plaintiffs have leased the said building at 275 Eighth Avenue, West, from the owner thereof and with the consent and approval of the defendants and have purchased other supplies and have been conducting the said business in Eugene, Lane County, Oregon, ever since said time.

That each of the defendants have been for a couple of days and are now interfering with the plaintiffs and with their personal and real property above referred to and lock and unlock the doors of the room at 275 Eighth

Avenue, West, in Eugene, Lane County, State of Oregon, and take money out of plaintiffs' cash register, and trespass on plaintiffs' property above described and sell their personal property and interfere with plaintiffs' customers and with plaintiffs' business in general at the above mentioned place in Eugene, Lane County, Oregon.

That plaintiffs have offered to return the above described property to the defendants if the defendants will return the \$1000.00 to the plaintiff and make an accounting for the property that plaintiffs' purchased elsewhere and which defendants have appropriated to their own use, all of which defendants refuse to do.

That plaintiffs have no speedy, adequate or complete remedy at law, and plaintiffs will be greatly damaged unless the defendants are restrained, and plaintiffs will suffer irreparable injury.

Defendants threaten to break into plaintiffs' said building and threaten to continue selling plaintiffs' property, and also the property which defendants have transferred and delivered to plaintiffs, and threaten to keep using plaintiffs' property, and keep trespassing on plaintiffs' said premises, above described in violation of plaintiffs' rights.

Wherefore plaintiffs pray for an injunction against the defendants restraining them from interfering with plaintiffs, or with the personal property above described, or with the building above described, and restraining them from trespassing on plaintiffs' premises at 275

Eighth Avenue, West, in Eugene, Lane County, Oregon.

L. M. TRAVIS and
A. K. MECK,
Attorneys for Plaintiff.

State of Oregon,
County of Lane—ss.

I, Geo. F. Vick, being first duly sworn, depose and say that I am one of plaintiffs in the above entitled suit and that the foregoing is true as I verily believe.

GEO. F. VICK.

Subscribed and sworn to before me this 6th day of June, 1916.

L. M. TRAVIS,
(Seal) Notary Public for Oregon.
My Commission expires Dec. 14, 1916.

(Copy)

IN THE CIRCUIT COURT OF THE STATE
OF OREGON FOR LANE COUNTY.

E. C. Simmons, Charles H. Vick, and Geo.
F. Vick, partners doing business under the
name and style of Vick Bros.,

Plaintiffs,

vs.

V. W. Winchell, and F. M. Hathaway,
partners, doing business under the name
and style of Eugene Ford Auto Co.,

Defendants.

ANSWER.

Comes now the defendants and for their answer to the complaint filed by plaintiffs herein admit that the plaintiffs were and are co-partners as alleged in the complaint.

Admit that the defendants were and are co-partners as alleged in the complaint.

Deny each and every other allegation contained in said complaint, except as hereinafter expressly admitted and except as hereinafter alleged.

For a further and separate answer and defense these defendants allege the truth to be:

That the defendants are now and were at all the times mentioned herein co-partners doing business under the firm name and style of Eugene Ford Auto Company, and their assumed business name was and is duly registered with the County Clerk of Lane County, Oregon.

That these defendants on the 29th day of May, 1916, and for a long time prior thereto were engaged as such co-partners in conducting an automobile and garage business at Eugene, in Lane County, Oregon, and engaged in buying and selling automobiles manufactured by the Ford Motor Company of Michigan; and were engaged in buying and selling gasoline, accessories, oils and parts of automobiles used and incident to the automobile business and the garage business, and that the plaintiffs, as co-partners and the Ford Motor Company, a corporation organized and existing under the laws of the State of Michigan, entered into a contract with the defendants wherein and whereby the plaintiffs

and the said corporation proposed to these defendants that the defendants should sell their business, stock, fixtures, parts and automobiles and deliver the same to the plaintiffs; and the defendants, in answer to said proposal proposed to sell their business at the special instance and request of the plaintiffs and the Ford Motor Company, a corporation, provided that the plaintiffs and the said Ford Motor Company should pay, or cause to be paid, to the defendants the purchase price of thirty-six Ford touring cars and a Sedan Ford car, to-wit: the sum of \$15924.25, to which amount should be added the sum of Eight Hundred Dollars and the further sum of \$1960.60 and the further sum of \$1825.00, being the invoice price of fixtures, parts and other materials incident to the business and included in the stock of these defendants; and by the terms of said proposal made by these defendants, as aforesaid, all of said sums of money were to be paid to the defendants, and payment and delivery of said property were to be concurrent and the plaintiffs and the said Ford Motor Car Company then and there on the 29th day of May, 1916, stated to these defendants that they would accept said proposal and would pay the said sums of money and await delivery of the property until payment was fully made in case of the whole sums of money to be paid, as aforesaid. That these defendants retained possession of the said property and the premises where the said business was carried on and were and are the owners of the lease of the building mentioned in the complaint, and permitted the plaintiffs to assist in invoicing the said stock and to be in and about

the said premises and to observe and learn how the said business was conducted, but these defendants retained control and possession of the said property and the whole thereof, and that the plaintiffs and the said Ford Motor Company wholly failed and neglected to pay any part of said purchase price, except the plaintiff paid to defendants the sum of One Thousand Dollars as earnest money to apply on said purchase price if the said purchase was completed in accordance with the provisions hereinafter set forth, but otherwise to be and become the property of these defendants. That the plaintiffs and the said Ford Motor Car Company have wholly failed to pay any of the sum of money to be paid, and agreed to be paid, as hereinbefore set forth save and except the sum of One Thousand Dollars, and have neglected and refused to pay the same, or any part thereof, save and except the said sum of One Thousand Dollars, and notified these defendants they would not pay the said purchase price or any further sums upon the same, and repudiated said contract; and the plaintiffs have lingered about the said premises of defendants, but prior to the commencement of this suit left the same and abandoned said contract; and on the day of the commencement of this suit one of the plaintiffs, to-wit: Geo. F. Vick, entered said premises and undertook to interfere with these defendants in the use of the telephone in the office of said business, and made an assault upon these defendants, and defendants ordered him from the premises and he departed from the premises and forthwith commenced this suit. That defendants are the owners and entitled to possession of said premises and the whole thereof and

of the said business and of all the property described in the complaint and herein described; and the plaintiffs wrongfully asserted a claim to have some right therein, the exact nature of which defendants do not know, and have commenced this suit for the purpose of harrassing these defendants and annoying them in the conduct of their business; and for the purpose of causing them trouble to drive them out of said business.

Wherefore, having fully answered said complaint, these defendants pray that this complaint be dismissed and that defendants have and recover judgment for their costs and disbursements herein most wrongfully sustained.

L. BILYEU,
THOMPSON & HARDY,
Attorneys for Defendants.

State of Oregon,
County of Lane—ss.

I, V. W. Winchell, being first duly sworn, depose and say that I am one of the defendants in the above entitled suit; and that the foregoing answer is true as I verily believe.

V. W. WINCHELL.

Subscribed and sworn to before me this 15th day of June, 1916.

HELMUS W. THOMPSON,
(Seal) Notary Public for the State of Oregon.
My Commission expires March 27, 1917.

IN THE CIRCUIT COURT OF THE STATE
OF OREGON FOR THE COUNTY OF LANE.

State of Oregon,
County of Lane—ss.

I, Story M. Russell, County Clerk of the above named County and State, and ex-officio Clerk of the Circuit Court of the State of Oregon for the County of Lane, do hereby certify that the foregoing copies of complaint and answer have by me been compared with the originals, and that they are correct transcripts therefrom and of the whole of the original as the same appear on file in my office now in my official care and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court this 11th day of August, A. D. 1916.

STORY M. RUSSELL,

County Clerk and ex-officio Clerk of the Circuit Court of the State of Oregon in and for
(Seal) the County of Lane.

Q. How much of your own cash were you using in this business outside of borrowed money

A. All that we had.

Q. Beg pardon?

A. All that we had.

Q. How much did that amount to? How much cash of your own did you have in these cars that were replevined in this action?

A. I don't remember the exact amount, or hardly the amount that we had. We had a—I can say this; when we went to the bank to find out how much capital we had, and if it was a little short we borrowed a little more; just depend. We paid as much as we could. You see we at one time carried fifty-two cars in stock at Eugene through the winter months and it takes quite a large amount of capital to handle the business, but we were compelled to take them whether we wanted to or not.

Q. Well, Mr. Hathaway, on April 22, 1916, you had a note at the bank amounting to some twenty-eight hundred dollars, covering seven cars, didn't you?

A. I couldn't say; we never really—we had confidence in the bank to take care of our business for us.

Q. If I showed you these notes would you be able to tell?

A. I can tell the notes that I signed. (Taking notes). That is our signature.

MR. SMITH: What is the date of that, please?

A. April 22nd.

Q. Is that true.

A. Yes, sir.

MR. SMITH: Is that 1916?

MR. McDOUGALL: Yes.

Q. And here is a note dated May 1st, 1916, for \$2800.00. Is that your note covering those cars?

A. Yes, sir.

A. Yes, sir. This is May 1, 1916.

Q. And here is a note dated May 24, 1916, for \$8400.00. Is that your note covering those cars?

A. Yes, sir.

Q. Now, would you say then you had on these particular cars \$12,000.00 borrowed from the bank?

A. Yes, sir—will you please state that question again?

Q. (Read.)

A. Whatever it figures out; it can be figured there. You realize, gentlemen, that we had to sell the cars on time in order to get the volume of business. A great many times men would come in and want to buy a car and pay half down; the balance \$25.00 per month; we had to carry these people, and it took—well in some cases it shows that we haven't a great deal of equity in the cars, yet we had our capital scattered out through the territory in cars sold.

JUROR: That paid you interest?

A. Yes, that paid our interest, and we felt that offset our interest we were paying at the bank.

Q. Wouldn't the bank take care of those cars you sold on time?

A. In some cases they would.

Q. Didn't they in most cases?

A. I couldn't say that.

Q. And if the bank took care of them, you wouldn't need to use your capital then. Isn't that true?

A. Sure.

Q. You don't remember whether it was nearly all of these cases that the bank took care of or not—that you sold on time?

A. No, sir.

Q. Now, you said that your business was on the

increase from year to year? Isn't that naturally true of all Ford dealers?

A. Yes, sir, that is in most places. Now, Mr. Woodson at Cottage Grove dropped back this year. In some territory, why, I suppose it wasn't. In some cases we was overestimated as to the number of cars we could sell.

RE-DIRECT EXAMINATION

Questions by Mr. Hardy: Did you want to sell your business to Vick Brothers, your gasoline business?

A. We had no desire to sell it.

Q. What is the fact as to whether or not that is a part of the transaction which Goden said you had to make to get out.

A. We considered they were joined together; negotiating the deal together.

Q. Did they come there together?

A. They came there together and we were notified by telegram, as was read here before, that Vick Brothers would take over our business; that is the first we knew anything about it.

Q. That is the Ford Company selected the person that you had to sell to; is that right?

A. Yes, sir.

Q. And you felt after what was said to you that you had to go through with the deal as he outlined it.

A. Yes, sir.

Q. If it hadn't been for the action of the Ford Motor Car Company, would you have dealt with Vick

Brothers? Would you have had any notion of selling this business?

A. No, we had no notion of selling out; we were going along.

COURT: Was your transaction with Vick Brothers prior to the time the cars were replevined?

A. Yes, it was—the time that we negotiated—that is began to talk with Mr. Goden; he seemed so positive that the deal would go through just as he stated, that we immediately began afterwards to invoice, before he came back from Portland.

COURT: When was it that Vick Brothers paid you the thousand dollars?

A. That was after the invoice.

COURT: Before or after the time that the United States Marshal took possession?

A. That was before the time.

COURT: Before the Marshal took it?

MR. HARDY: Set out in these pleadings, your Honor, the date; the 29th of May; on the 26th they got the letter cancelling.

COURT: Now, Mr. Hathaway, I understand from your testimony that you claim that the action of the Ford Motor Company in cancelling their contract and replevining these cars destroyed your garage business?

A. Yes, sir.

COURT: And that by reason of that fact you had to close that up or sell it out. Is that the idea?

A. It seems as though Vick Brothers put up a deposit there with the court and took over the business, you see.

COURT: You are claiming here, as I understand it, that you were compelled to virtually close this business because the Ford Motor Car Company cancelled their contract and replevined these cars that you had previously ordered and paid for?

A. Yes, sir.

COURT: And that was the reason you had to close your garage. Now, do I understand from that that you would not have been able to have carried on this garage business if the Ford Motor Company had refused to furnish cars—sell you cars?

A. We could have carried on a general garage business because we were well known in the community, and, for instance, our mechanic who was working for us, immediately went off to himself and started up a little place repairing cars, and is doing a nice business at the present time.

COURT: Then how do I understand that you base your claim that the replevining of these cars destroyed the garage business? You understand this contract only had two months to run, and in any event at the end of that time the company would have been under no obligations to sell you cars.

A. Well, you see Vick Brothers had a deposit on our business and they had us tied up, you see, in a way.

COURT: On what part of your business?

A. The garage end; accessories and parts.

COURT: That is because of their contract or agreement with you?

A. Yes, sir.

COURT: Your idea is then that the failure of the

Motor Car Company, if I understand you correctly—the failure of the Ford Motor Company to carry out the preliminary agreement that you had with Mr. Goden was really the cause of your trouble.

A. Yes, sir.

COURT: That is the idea?

A. Yes, sir.

MR. HARDY: If I may explain. That is set up in this answer that is offered in evidence—a three-cornered deal.

COURT: What I couldn't get clear through my mind was how the mere taking of these cars by the Ford Company away from these people, could destroy their garage business, when that contract only ran for two months.

MR. HARDY: They forced us as a part of it—

COURT: I understand now, I haven't examined this contract, but I suppose it is like all these contracts, and there was no obligation on the part of the Ford Company to furnish these people any cars.

MR. McDOUGAL: The same contract we had up—

COURT: Optional with the company whether they furnished any cars at all, and optional with the dealer whether they would take them.

MR. SMITH: Not optional; the dealers they had to take them.

MR. McDOUGAL: The dealers could cancel.

COURT: Either company could cancel, and the dealer was obliged to take any cars, nor the company obliged to furnish them. That is all. I just wanted to understand his theory. I couldn't get it.

Witness excused.

RAYMOND D. GOULD, a witness called on behalf of the defense, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Hardy: Mr. Gould, where do you live?

A. 593 Carl Street, Portland, Oregon.

Q. What is your business?

A. Buying and selling second-hand Ford cars.

Q. Have you ever been in business with the Ford Motor Car Company?

A. Not in business with them.

Q. What was your business with them?

A. Employe.

Q. What was your position?

A. Was assemblyman and for two months was territory representative.

Q. As territory representative of the Ford Motor Car Company, did you investigate the business of Winchell and Hathaway at Eugene?

A. Also other agents; yes, sir.

Q. State to the jury the kind of investigation you made of Winchell and Hathaway's business, at Eugene. What kind of business they did.

A. I made it a point after calling on the agents in each town, in my spare moments to call on the Ford owners, who owned Ford cars, and in a round-about way, without disclosing my identity, find out the kind

of service they were getting from the agents in that particular district or locality; whether the service was good, or whether they had over-charged them, and whether they were taken care of in parts, and everything that would be of benefit to the Ford owner. I considered it my duty when I was with the company to do that as a protection to the man who owned the car.

Q. Did you report to the company as to whether or not the agent had the good will of the public doing the business?

A. Just verbally; not in writing.

Q. As a result of your investigation of Winchell and Hathaway—the investigation you made on behalf of the Ford Motor Car Company, what did you find as to whether or not they had the good will of their business?

A. Well, I became acquainted with some of the Commercial Club at Eugene, and I found through other sources that they are A-1 in that community; young men who were struggling along to improve their business; they had the support and good will of the bankers, and their name was just as good, and their character just as good as any man that was in the town of Eugene—well thought of.

Q. What about their business standing?

A. Their business—while I was there on my last trip they had all they could do; they sold a car a day the two days I was there, and their prospects were excellent.

Q. Did you make that report to the company at Portland?

A. Verbally, yes, sir. Nothing in writing.

CROSS EXAMINATION

Questions by Mr. McDougal: To whom did you make that report?

A. To Mr. Evans.

Q. And when was this that you visited the Winchell and Hathaway agency?

A. Well, I don't know just exactly the date, but I have my voucher receipts here; my traveling expense account here. But I am of the opinion that it was about—either the last of February or the first of March—between the 15th of February and the first of March, because I made my last trip over into the Bend country.

Q. How many times were you down there? Just this once?

A. Twice.

Q. Twice during that time.

A. Yes, sir.

Q. You were out on the road then all the time.

A. Yes, sir.

Q. How long did you work out on the road for the Ford Motor Company?

A. About two months. From the 15th of January until about the first of March and a little later.

Q. And you are not employed by the Ford Motor Company now?

A. No, sir.

Q. Why were you taken off the road?

A. I don't know.

Q. Wasn't it for drinking?

A. I haven't been able to tell.

Q. Weren't you taken off the road for drinking and incompetency?

A. No, not exactly that. I was informed by Mr. Evans to pack a bottle of booze with me and gin up these agents, and in that way I may be able to sell a few car-load lots.

Witness excused.

MR. SMITH: If the Court please, I think the paragraph you were asking about a moment ago is as follows:

“Clause 41: Estimate of autos required: In order that the first part may determine the prospective requirements of its business for the year ending July 31, 1916, and may base its contracts for materials, etc., thereon, the second party agrees that he will require consignments of not less than 288 Ford automobiles for his said entire territory between the date hereof and July 31, 1916, to be shipped in the various months as per the following schedule, and he hereby makes requisition for such automobiles to be shipped as stated, namely:”

COURT: Further on in the contract isn't there a qualification of that?

MR. SMITH: Yes, I will read that. The next section is: “Requisitions May Be Declined: ‘(42) First party agrees that the foregoing requisitions of the second party shall receive first party's careful and good faith attention, but first party does not agree absolutely to fill them, but expressly reserves the right to refuse them from time to time, or such parts of them as the first party deems necessary or proper, and all such requisitions are subject to delays occurring from any cause whatsoever

in the manufacture and delivery of its product—no legal liability to fill such requisitions being incurred under any circumstances. And the second party may cancel, upon one month's full written notice to first party, the said requisitions or what remains unfilled thereof."

And further on, clause 48 reads: "This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party, and such cancellation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from second party prior to the date when such cancellation takes effect."

DEFENSE RESTS

F. B. NORMAN, recalled by the plaintiff in rebuttal.

DIRECT EXAMINATION

Questions by Mr. McDougal: Mr. Norman, referring to this alleged offer of settlement by Mr. Goden, which it has been testified was entered into between Messrs. Winchell and Hathaway, down at Eugene, and Mr. Goden, after that conversation in which Mr. Goden said that he would take up with the office here in Portland the question of settlement, did he come up to see you?

A. Yes, he did.

Q. What did he say?

MR. SMITH: I object to that; that is not material. Counsel knows that, I think. Wholly immaterial because a transaction between them and not in the presence of these defendants, and of which they had no knowledge.

COURT: You are making some claim because the company didn't comply with Goden's agreement, as you claim.

MR. SMITH: Yes, Goden made an agreement they didn't comply with. Now, the point we make is it isn't material as to the reason.

COURT: You haven't shown Goden had any authority to make such contract; he said he would take it up with the company. Counsel has a right to know whether he did take it up and what instructions he had.

Q. (Read) What did Mr. Goden say? What did he report to you?

A. Mr. Goden reported they had not complied with the terms of our contract, and the cars had been sold outside the territory, and we notified him that we would have their contract deposit and their rebate as soon as the territory adjustment and the infringement had been taken care of satisfactory to our office, to comply with the terms of our contract.

MR. SMITH: You notified who?

A. Mr. Goden to convey that message to the Eugene Ford Auto Company.

Q. And did you give Mr. Goden any instructions, instructing him to return to Eugene?

A. Yes, sir.

Q. And what instructions did you give him when he was to return to Eugene?

A. That as soon as the cars had been accounted for and buyer's agreement sent in to cover the cars that had been sent into their territory, that their contract deposit and their rebate would be returned to them, providing, the cars had been sold in their territory, and that their business had been conducted according to the policy of the contract they had signed with us.

Q. Was that ever done by Winchell and Hathaway?

A. They never did, no.

Q. And what was the result?

A. They started in a suit against us to recover this contract deposit and rebate which we withheld until the thing was settled.

Q. In other words, you refused to abide by any agreement that Mr. Goden had made down there because—

MR. SMITH: Object to—

Q. I will withdraw that. Mr. Norman, are you acquainted with this man Gould who testified here?

A. Yes, he was my employe for some time.

Q. You employed him?

A. Yes.

Q. When did he sever his connection with the Ford Motor Company?

A. I don't think he ever severed his connection, in anyways, except he was laid off from time to time, and since that time I understood—

Q. Just a minute; not what you understood. Did you lay him off originally?

A. Yes, sir.

Q. For what reason?

A. For drinking.

CROSS EXAMINATION

Questions by Mr. Smith: You say that under your contract you still hold these deposits and rebates subject to the adjustment of the territory and specifications as to where the cars went?

A. Yes, sir.

Q. Then according to your interpretation of the contract, you first fix the wholesale price to the dealer, don't you?

A. To our agents.

Q. You establish your own wholesale price to your agents?

A. Yes, sir.

Q. And you also establish the retail price that he was to charge the consumer?

A. The contract takes care of that.

Q. Yes, and you bound them down by contract not to vary from that, didn't you.

A. Yes, sir.

Q. And you also limited or restricted them as to territory?

A. Yes, sir.

Q. And you prevented them from selling anybody else's cars?

A. No, sir.

MR. McDOUGAL: The contract takes care of that.

Q. Did you or did you not make these men surrender their contract with Dodge Brothers?

A. No, sir.

Q. You didn't?

A. We have always told our agents we didn't care what kind of a car they sold, but if they did insist on selling other makes of cars than ours, we had a right to revoke their contract, or place the contract with those who would be satisfied with the Ford cars.

Q. Absolutely. You write them a letter to that effect, too, didn't you?

A. No, sir, I don't think so.

Q. What is the difference between your demanding they shall be your exclusive agent and your taking the business away from them if they didn't?

A. Because they don't have to be our Ford agents unless they want to.

Q. But if they want your business at all, they must be yours and nobody else's?

A. If they want that large a contract. They had a big contract.

Q. That is what I mean. If they want to represent you for that large a contract it must be exclusive?

A. Yes, sir.

Q. And must not sell anybody else's cars?

A. No, sir.

Q. And although they sold the cars and you got the money, all the money out of them you could, you still hold back their deposit money and their bonus money

because you say the territory has not been adjusted, and they haven't shown you where the cars went?

A. Because the cars were allotted them for that territory were not sold in that territory that was allotted to these agents.

Q. Well, you got your money out of it, didn't you?

A. Yes, sir.

Q. And you made the cars to sell?

A. Yes, sir.

Q. And you shipped them to them to sell?

A. Yes, sir.

Q. And they were selling your cars only. Everything they sold were Ford cars?

A. Yes, sir.

Q. And isn't it a fact also, that your Ford Motor Car Company, although trying to restrict them to a specified territory, reserved the right in itself to go in and sell in competition with them?

A. I don't understand that.

Q. Don't you reserve the right in your contract to go in and sell against them?

A. They were allowed a commission if we did.

Q. You would make the sales and they wouldn't be building up a good business, would they?

A. Sir?

Q. You would make the sales and destroy the good will of their business?

A. Very few cars ever sold in their territory by us. In fact never was a car sold in their territory for which they didn't get commission.

Q. Please say how much commission you pay them if you sell the entire territory.

MR. McDOUGAL: The contract provides for that.

MR. SMITH: Show us the clause of the contract that shows that.

A. Have Mr. Goden do that.

Q. He says you know it.

A. Wouldn't take long to see it.

MR. GODEN: Five per cent is the amount.

Q. Find it in the contract.

MR. McDOUGAL: Paragraph 31 reads: “* * and in such case will pay one (and only one) commission of 5% of the list price of the automobile or automobiles so sold after it shall have received the full purchase price in cash, to the second party, or if there shall be a sub-limited agent in that special territory and locality where such sale is made then such five per cent shall be paid to such sub-limited agent. This provision shall not apply to sales of parts or accessories which are otherwise provided for herein, nor shall it apply to sales to or through sub-limited agents, but only to those made by first party directly to purchasers domiciled or residing in said territory within the meaning of Section 4 of this agreement. First party shall not pay any commission to second party or his sub-limited agents on any sales to residents outside second party's territory, even though delivery should be made within said territory to residents of such other territory.”

Q. So that is the clause to which you refer, is it? This clause to which you refer is the one Mr. McDougal read?

A. I imagine so.

Q. Do you know whether it is or not?

A. Yes.

Q. Well, is it?

A. Yes.

Q. Now, you say under that the Ford Company can go into their territory and sell machines?

A. We can, yes. If they are not going after their business, we can send our own men in.

Q. It doesn't say anything about that here, does it—if they are not going after their business?

A. It does, yes.

Q. Find it in the contract.

A. Specified in this way—if they are not working the territory, we can cancel the contract.

Q. That is another question. What this says is (Paragraph 31): "First party"—that is the Ford Company back east?

A. Yes, sir.

Q. The Ford Company "hereby expressly reserves to itself the right to make direct sales to customers in the territory above described"—nothing said there about their failing to discharge their duty there, is there. It expressly reserves the right?

A. Yes, sir.

Q. "And in such cases will pay one (and only one) commission of five per cent." Their commission was 15%, wasn't it, if they made the sale?

A. Yes, if they made the sale.

Q. "of the list price of the automobile or automobiles so sold after it shall have received the full purchase

price in cash, to the second party, or if there shall be a sub-limited agent in that special territory and locality where such sale is made, then such five per cent shall be paid to such sub-limited agent." Would come to them only if there is no sub-limited agent down there?

A. It would, yes.

Q. And they wouldn't get anything—

A. It would be included in his volume of business.

Q. "This provision shall not apply to sales of parts, or accessories, which are otherwise provided for herein, nor shall it apply to sales to or through sub-limited agents, but only to those made by first party directly to purchaser domiciled or residing in said territory within the meaning of section 4 of this agreement." So you could sell to as many people as were not domiciled or residing in their territory as you wanted to?

A. Yes, sir.

Q. Without paying them any commission at all.

A. Pay them five per cent.

Q. No.

A. We always did.

Q. Where it says here, "This provision shall not apply to sales of parts or accessories which are otherwise provided for herein, nor shall it apply to sales to or through sub-limited agents, but only to those made by first party directly to purchasers domiciled or residing in said territory within the meaning of section 4 of this agreement. First party shall not pay any commission to second party or his sub-limited agent on any sales to residents outside second party's territory even

though delivery should be made within said territory to, residents of such other territory?"

A. Well, we never sold any cars in their territory.

Q. I am asking you what your contract reserved the right to you to do, not what you actually did.

A. Just what it says.

Q. That you could sell a thousand automobiles if you had a chance to people down there right in Eugene?

A. Absolutely.

Q. And deliver them in Eugene?

A. And deliver them.

Q. And not pay them a cent commission?

A. If we wanted to.

RE-DIRECT EXAMINATION

Questions by Mr. McDougall: Just one more question, Mr. Norman: The same provision would apply to this contract, would it not, that Winchell and Hathaway, for instance, could go into the territory of their sub-agents and sell cars?

A. Absolutely.

Q. Upon paying the sub-agent a five per cent commission?

A. Certainly.

Witness excused.

George Evans, a witness called by the plaintiff in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. McDougall: Mr. Evans, what is your business?

A. Wholesale manager of the Ford Motor Company.

Q. For what company?

A. Ford Motor Company.

Q. Were you wholesale manager for the Ford Motor Company during the months of January, February and March, 1916?

A. Yes, sir.

Q. Are you acquainted with a former employe of the company by the name of Gould?

A. I know him, yes

Q. Was he employed under you?

A. He was.

Q. For what length of time?

A. About—practically a month or six weeks.

Q. In what capacity?

A. As traveling representative

Q. Did you, during the time that he was employed by you, instruct him while out on the road to carry a bottle of liquor with him, or—as it was put here, booze—and “gin the agents up?”

A. No, sir; emphatically not.

Q. Absolutely never gave him any instructions of that kind?

A. Never.

No cross examination.

Witness excused.

PLAINTIFF RESTS.

DEFENSE RESTS.

Whereupon proceedings herein were adjourned until tomorrow morning.

Wednesday, September 6, 1916.

MR. SMITH: There are two or three motions in relation to the record we want to make to keep the record straight on the evidence. We first move to strike from the consideration of the jury all evidence offered on behalf of the plaintiff as to the payment to the First National Bank of the twelve thousand dollars on the ground that it was not authorized by the defendants or made through any privity of relationship requiring plaintiff to make such payment. Upon the further ground it was a voluntary payment if made at all and cannot be charged to the defendants under any circumstances.

COURT: I think that is well taken as far as constitutes any defense in this case.

MR. SMITH: The defendants move that the jury be instructed that the plaintiff has no case to submit to them, under the plaintiff's own evidence, first because the contract involved is in violation of the Sherman Anti-Trust Act and the Clayton Act, and being violative, the title to the cars absolutely passed when the drafts were paid, and that the plaintiff itself has shown that the plaintiff has no title to the cars whatsoever, but they were fully paid for by these drafts, and the title is in the defendants, and at the time this case was instituted the defendants owned the cars absolutely. Second, that the plaintiff has proved no demand before entering this

action, and even if the contract were not in conflict with the Anti-Trust Acts of the United States, it provided they would have a lien on these cars for the amount of money they advanced, and they never extinguished or offered to extinguish that, but began suit without any demand or tender.

COURT: Isn't there a provision in the contract by which the plaintiff company could recover possession of these cars upon payment of advances?

MR. SMITH: They haven't paid them. There is a provision to this effect: "This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation for all orders for automobiles, automobile parts or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect.

In case of the cancellation or expiration of this contract the first party may at its option retake possession of all of such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration, at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said limited agency) to take orders for the sale of such automobiles

as he may have on hand unsold at the time of such cancellation or expiration, the same to be made strictly under and in accordance with the terms of this contract, provided however, if after reasonable effort on the part of second party to make such sale there shall remain on hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use for such other disposition as he may choose to make."

My point is they were all sold and were not consigned. That consignment we say depends upon the prior contract which we say is violative of the anti-trust laws. We take it that the transaction was an absolute sale and not consignment. They attempted to treat these cars as having been consigned but they didn't tender the amount we had paid into them, and right there is a strict provision that if they proceed on that theory they must at the same time "return to him his advancements on the said automobiles," which they never did. So either way we have it—if the contract violates the anti-trust laws of the United States, the cars are ours; if it does not violate them, they didn't tender or offer to return the advancements, and in either case they are out of court, and, as counsel has suggested, if their contract is valid we were lawfully in possession of these machines, even if they owned them—we had acquired them lawfully and had a lien for 85 per cent on advances, and they didn't extinguish that lien and

didn't make a demand, and the rule is absolute when a person can replevin personal property, even though it belongs to another, demand must be made for the return or the action for replevin will not lie.

COURT: As I interpret this contract, for the purposes of this case it is immaterial whether these cars were held by the defendants under consignment or as a sale. In any event the contract provided that the Ford Motor Company might recover possession of them in case the contract was cancelled upon returning the advances, but before it could recover, it must return the advances or at least tender them, and the evidence in this case shows it did neither—it did not return the advances nor did it tender the money. All the evidence is Mr. Goden said he had the money in the bank but never offered to pay it—never gave the defendants any opportunity to accept it, but proceeded to institute this action without complying with their contract, and therefore I think as far as that feature of the case is concerned the defendants are entitled to a ruling instructing the jury to return a verdict in their favor for possession of this property.

MR. SMITH: Or their value if possession cannot be returned. That leaves the case open for determination by the jury of the question of damages.

COURT: What about the \$800?

MR. SMITH: The \$800.00, as I understand, is a deposit we put up in cash in order to get their contract, a requirement they made of us; to enter in their employment we had to deposit \$800.00; that is all the consideration for that. We are entitled to that also.

The \$800.00 is cash, cold cash, belonging to us, they have. Now, they have cancelled the contract and are holding without consideration.

COURT: Something said about deposit in court; what is that. Does that cover this \$800.00?

MR. SMITH: No, it does not cover—is not figured in. I can't figure it. Mr. McDougall can figure that.

MR. McDOUGALL: The deposit of \$800.00 is covered by paragraph 40 of the contract, "As a guaranty of the full and faithful performance by the second party of all the terms and conditions of this agreement, the second party has deposited with the first party the sum of eight hundred dollars in cash and it is agreed that the first party may, at its option, apply any part or all of said amount towards the liquidation of any past due accounts owing by second party to first party, or any other legitimate claims arising from the second party's failing to perform the obligations of this agreement, and the balance of said contract deposit, if any, shall be returned to the second party at the termination of this agreement and the fulfillment of all its requirements. In case of cancellation or termination of this contract as herein provided such deposit balance on hand may be retained by first party as security for and until the fulfillment of all provisions hereof as to the winding up of the business of the agent and final disposition of all unsold cars as stipulated herein. Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party."

COURT: Do you claim there is any showing in

this case, or any evidence showing or tending to show any right on the part of the company to retain this \$800.00?

MR. McDOUGALL: Yes, I think Mr. Norman testified that the contract in this case had been cancelled because of the fact that the defendants here had been selling cars outside of their territory and at reduced prices, and that they had refused to pay over this contract deposit because of these breaches of the contract, and until the matter was adjusted, and it was found out what these breaches were and what they consisted of.

COURT: There is no evidence to show the amount of damages or anything of that kind. Then there is another matter alluded to during the trial—that is the bonus. Is there any controversy about that?

Mr. Smith: No, it was not deposited. Mr. Hathway testified that when Mr. Goden was down there they were figuring up at first and they concluded that Hathaway and Winchell, our clients, were entitled to between \$1800 and \$1900 as a bonus; under these circumstances we take \$1800.00 to be absolutely safe; there is no denial of the testimony; we might ask \$1900.00, but we ask \$1800.00 to be absolutely sure; that was the lowest amount they figured on; they didn't state specifically, but between \$1800.00 and \$1900.00.

COURT: The other issue is the amount of damages if any the defendants suffered by reason of taking these cars?

MR. SMITH: Yes, your Honor, that is one issue, and another matter, in order that we may know how to present it to the jury. The whole case as we view it

falls under the Anti-Trust Laws of the United States. Now, in our answer there is a prayer for and an asking for punitive damages.

COURT: I think you can pass that for I don't think there is any evidence on which to base it.

MR. SMITH: Then we thought the case would fall under the Clayton Anti-Trust Act instead of under the common law, and being under the Clayton Act we ask for single damages.

MR. McDOUGAL: May we have an exception to the Court's ruling on the motion to take from the jury the question of whether or not demand was made upon the defendants and a proper tender made to the defendants before the institution of the action?

COURT: Yes.

MR. McDOUGAL: And also an exception to the ruling of the Court with reference to the amount of \$800.00 deposited by the defendants with the plaintiff for the faithful performance of the contract, and also with reference to the ruling of the Court on the question of the sum of \$1800.00—

COURT: I haven't ruled that the defendants are entitled to recover that; that is for the jury. I was just asking for an understanding of the testimony on that subject.

MR. SMITH: I understood your Honor to rule this case came under the Clayton Act.

COURT: No, I made no ruling. I don't think it is material in this case whether it comes under one act or the other.

MR. SMITH: No ruling. Will the plaintiff have

the opening and closing on our defenses, or will we have it?

COURT: They will have it.

COURT: Mr. Smith and Mr. Hardy, before you proceed with the argument, an examination of the answer shows you have made no claim or issue for either the bonus or the \$800.00, and I have some very serious doubts whether either of these questions should be tried out in a replevin like this and I assume that is the theory on which you filed your answer. You simply ask for a return of the property and \$25,000 damages. Under the record as it stands these two items will have to go out.

Thereupon after argument to the jury the Court instructed the jury as follows:

Gentlemen of the Jury: The case to be submitted to you is an action brought by the Ford Motor Company against Winchell and Hathaway and others to recover possession of some thirty-seven automobiles. The plaintiff claims and alleges in its complaint that in September, 1915, it entered into a contract with Winchell and Hathaway, by the terms of which the latter should become the sales agents of the plaintiff company for the sale of its cars in certain designated territory, with their head office at Eugene. That the contract provided that it might be cancelled or revoked at any time by the plaintiff company without cause, and that in case it was so revoked that the plaintiff would be entitled to the possession or return to it of any cars thereunder which Winchell and Hathaway had on hand at the time, upon the

payment to them of the money advanced by them on such cars.

It is alleged in the complaint that the plaintiff elected to cancel the contract and did cancel it, and that it offered to return to the defendants the amount of money which they had advanced on the cars previously ordered, and demanded possession of the cars then on hand. The defendants admit making the contract. They deny, however, that the plaintiffs ever offered to return the money which they had advanced upon the cars, and therefore claim that the plaintiff was not entitled to the possession of the cars at the time they brought this action, and that the action was therefore wrongfully brought, and by reason of that fact the defendants have been damaged in their business to the amount of \$25,000.

Now, the contract as entered into between the plaintiff, the Ford Motor Company, and the defendants, as I said, was dated September 10, 1915. It expired by limitation on the 31st day of July, 1916, but it contained a provision that either party to the contract might revoke or cancel it at any time without cause—without giving any reason for it, and it appears in testimony that the Ford Motor Company exercising the right given by this contract, did in fact cancel it by a telegram which it sent to the defendants, and by registered letter which was received by the defendants prior to the time this action was instituted. It also appears in testimony that at that time the defendants had in their possession some 37 cars which they had previously ordered from the plaintiff, upon which they had paid 85 per cent of the list price, or all that they were expected or required to

pay under the contract. The plaintiff company, upon the cancellation of this contract was entitled to a return of the cars which the defendants had on hand at the time, upon the payment or repayment to them of the amount of money which they had advanced or paid for the cars, which is admitted by the parties to this case to be \$16,077.50, so that the plaintiff would have been entitled to the possession of these cars if it had paid to the defendants the \$16,077.50 but the evidence shows that it did not make such payment nor did it tender to the defendants this amount or any other amount on these cars, and therefore it was not entitled to the possession of the cars at the time this action was brought, and inasmuch as it was not entitled to the possession the action was wrongfully brought and the defendants are entitled to a return of the cars, or their value in case a return cannot be had, so that in any event it will be your duty, under the law, to find a verdict in favor of the defendants to the effect that they are entitled to a return of these cars, or their value in case a return cannot be had.

So that the first question for you to determine will be what the value of these cars is. The plaintiff says that they are worth \$16,077.50. That is the amount the defendants paid for them. The defendants, on the other hand, claim and allege that the cars were worth \$18,555.25, which I understand from the testimony to be the retail price of the cars, as specified in the contract between the parties.

Now, it is for you to determine from the testimony in this case what was the reasonable value of these cars, and that amount must not be less than the sum admitted

by the plaintiff, which is \$16,077.50, and it must not be more than the amount claimed by the defendants, which is \$18,555.25. So you will ascertain that amount and insert it in your verdict.

Then the next question will be whether or not the defendants are entitled to damages from the plaintiff by reason of the fact that the plaintiff wrongfully took possession of these thirty-seven cars. The defendants allege that the effect of the plaintiff's action was to put them out of business—destroy their business—and that by reason of that fact they were damaged in the sum of \$25,000. And they are asking at the hands of this jury a verdict for the return of these cars and for damages they suffered or claim to have suffered on account of the wrongful act of the plaintiff in taking possession of the cars. That is a question of fact for you to determine from the testimony what damages if any the defendants suffered; what was the damage to the defendants' business by reason of the fact that the plaintiff wrongfully took from their business these thirty-seven cars.

Now, in arriving at a conclusion on that subject, it is proper for you to take into consideration the nature and character of the business in which these defendants were engaged at Eugene at the time these cars were taken and determine, if you can, what effect in dollars and cents the taking from them of these thirty-seven cars had upon that business. You should also keep in mind the fact that this contract between the plaintiff and the defendants would expire by limitation on the 31st of July, which was two months after these cars

were taken, therefore the defendants could not, under any circumstances, claim the right to act as the agent of the Ford Company under this contract, or any contract, longer than the 31st of July, 1916, or two months after this transaction.

Again, in estimating the amount of damages to which the defendants are entitled, if any, you should bear in mind the fact that this contract had in fact been legally cancelled prior to the time the plaintiff took possession of these cars. As I said a moment ago, the contract provided that it might be revoked or cancelled at any time by either party without cause, and the Ford Motor Company had exercised its option and right under this contract and had cancelled it, so that it was at an end before they took possession of these cars, and therefore at the time the cars were taken the defendants were in the position of doing a garage business at Eugene without any contract with the Ford Company, and in possession of thirty-seven Ford cars, to which they were entitled. Now, the question is, what was the damage to that business under these circumstances, caused by the plaintiff taking these thirty-seven cars wrongfully from the possession of the defendants.

Now, the defendants claim and allege that their business was entirely destroyed. You have heard the testimony upon that question and it is for you to say whether or not the taking of these thirty-seven cars from their possession and the circumstances under which they were taken destroyed or injured their business, and if so, to what extent, if you can arrive at that conclusion. They allege in their answer that their business was pay-

ing an income of \$300.00 a month and that they were deprived of that income by reason of the wrongful acts of the plaintiff company.

Now, in estimating the damages you should keep in mind the amount that you allow as the value of these cars. The taking of the cars away from the defendants, of course, deprived them of the right to sell them and of any profits that they might have derived from the sales. That was one thing that, of course, was the result of this taking of the cars by the plaintiff company. Now, the profits on the sales would, of course, be a matter to be considered by the jury in arriving at your verdict in this case, but if you allow that on the value of the cars, that is, if you find that the value of the cars is the amount that is claimed by the defendants, which is the wholesale price with the 15% added, or the profits that the defendants would have made if they had sold the cars, then you should not allow the same profit in estimating the damages. In other words, you should be careful not to allow the same item twice in the item of damages.

Now, the burden of proof is upon the defendants in this case to show by evidence which satisfies the jury, so that you can arrive at an intelligent and satisfactory verdict as to the amount they were damaged, if any, by this act of the plaintiff. It should not be based upon speculation nor conjecture, but upon the facts and circumstances of the case as disclosed by the testimony.

You are the judges, gentlemen, of all questions of fact in this case. You are the judges of the credibility of the witnesses, and it is for you to determine what weight is to be given to the testimony in this case and

what conclusions are to be derived therefrom. There was evidence during the trial tending to show that after this action had been begun the plaintiff company made a payment of some kind to the bank at Eugene, not very clear from the testimony what it was nor how it came to be made, but in any event it is wholly immaterial here. We are wholly unconcerned with that matter at this time, because the controversy here is over the right to the possession of these cars, and damages if any the defendants suffered by reason of the fact that the plaintiff wrongfully took them. The other question is not here for the consideration of the court and jury at this time and need not enter into your deliberations.

There has also been something said during the trial about a deposit made by the defendants with the plaintiff company at the time this contract was entered into. The contract contains a provision to the effect that the defendants would deposit with the plaintiff company a certain sum of money necessary for certain liabilities and to secure certain liabilities. Now, that matter is not before the jury. There is no issue here in this case about that. There is nothing said in the pleadings about it, and there is no testimony here to show whether or not there is any offset against this \$800.00. And the same may be said on the question of bonus. There has been something said during the trial about the defendants having earned a bonus, and to which they are entitled, but that question is not in this record. There is no mention made of it in the pleadings and it is not an issue for consideration by this jury. The only question here is the right to the possession of these cars, and the dam-

ages, if any, which the defendants suffered by reason of the wrongful taking of the cars from their possession by the plaintiff. The other questions, if there are questions between these parties, will have to be determined in some other proceedings and not in this replevin action.

Mr. Smith: The defendants are satisfied with the instructions.

Mr. McDougall: Plaintiff desires to except to the refusal of the court to give the instructions requested.

COURT: Any particular one?

Mr. McDougall: I think you didn't give any except as modified, and especially with reference to instructions concerning the contract which was claimed was entered into on May 29th by the defendants to sell to Vick Brothers. I think you ruled, instead that they failed to prove agency on the part of Goden to effect that settlement.

Mr. Smith: That has nothing to do with the issues submitted to this jury.

COURT: I might call the jury's attention to that, although I think it is not very material. It seems Mr. Goden's interviews with these defendants, the first one he had, was a tentative interview, and he was required to report to his principal for instructions. He had no authority to bind the plaintiff by any contract because he was required to report to his principal and get instructions, therefore there was no contract binding on the Ford Motor Company, entered into by him on the 29th day of May, 1914, because he had no authority to make such a contract.

CERTIFICATE OF REPORTER.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Judge Chambers.

Portland, Oregon.

Ford Motor Company, a corporation,

Plaintiff,

vs.

No. 7163

E. A. Farrington, V. W. Winchell and

F. M. Hathaway et al.,

Defendants.

I hereby certify that I acted as Stenographic Reporter in the above entitled cause and court, reporting fully the testimony given therein on the 5th and 6th days of September, 1916, and that the foregoing is a full, true and correct transcript of all the evidence given on said dates in said cause.

Dated February 5, 1917.

MARY E. BELL,

Notary Public.

My Commission expires on February 1, 1921.

(SEAL)

And now, because the foregoing matters and things are not of record in this cause, I, Robert S. Bean, District Judge, and the judge trying the above entitled action in the District Court of the United States for the District of Oregon, hereby certify that the fore-

going bill of exceptions truly states the proceedings had before me upon the trial of the above entitled action and contains all the evidence, both oral and written, introduced by either of the said parties through said trial and all the instructions of the court on the questions of law presented, and the exceptions taken by the plaintiff therein were duly taken and duly allowed, and that said bill of exceptions was duly prepared and submitted within the time allowed by the rules of the court, as extended by order of court extending plaintiff's time within which to prepare and serve its bill of exceptions up to and including the 12th day of January, 1917, and a further order of the court duly made and entered, extending plaintiff's time within which to prepare and serve its bill of exceptions up to and including the 15th day of January, 1917, and is now signed, sealed and settled as and for the bill of exceptions in the above entitled action, and the same is ordered to be made a part of the record in said action. And it is further ordered that all original exhibits may be deemed attached to this bill of exceptions.

R. S. BEAN,
Judge.

Dated this 10th day of February, 1917.

And afterwards, to-wit: on the 6th day of March, 1917, there was duly filed in said Court, a stipulation, in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Ford Motor Company, a corporation,
Plaintiff and Appellant,

vs.

V. W. Winchell and F. M. Hathaway,
co-partners, doing business under the
firm name and style of Eugene Ford
Auto Company, et al.,
Defendants and Respondents.

STIPULATION.

It is hereby stipulated by and between the parties hereto by their respective attorneys that the transcript of record prepared herein containing Citation on Writ of Error, Writ of Error, Amended Complaint, Answer, Reply, Verdict, Judgment, Motion for New Trial, Order Denying Motion for New Trial, Petition for Writ of Error, Order Allowing Writ of Error, Staying Proceedings and Fixing Amount of Bond, Supersedeas Bond, Assignments of Errors, and Bill of Exceptions, as prepared by counsels for plaintiff and appellant, is correct and that the Clerk of the District Court of the United States for the District of Oregon may certify to the correctness thereof without comparing the same or any part thereof with the original pleadings and records on file in his office in the above entitled court.

Dated this 6th day of March, 1917.

E. L. McDOUGAL,
Of Attorneys for Plaintiff and Appellant.

C. G. HARDY,
LOGAN & SMITH,
Attorneys for Defendant and Respondent.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing Writ of Error and in obedience thereto, and in accordance with the stipulation signed and filed on the 6th day of March, 1917, by the plaintiff in error and the defendant in error, through their respective attorneys, do hereby certify that I have not compared the foregoing printed Transcript of Record with the original thereof in the case in said Court of Ford Motor Company, a corporation, plaintiff and plaintiff in error, against V. W. Winchell and F. M. Hathaway, co-partners, doing business under the firm name and style of Eugene Ford Auto Company, defendants and defendants in error, but that the same is a full, true and correct transcript of the record and proceedings (without comparison) in said Court in said cause, as the same appear of record and on file at my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and seal of the above entitled Court this 28th day of March, 1917.

(Seal)

Clerk.

I hereby certify that the within is a full, true and correct copy (and the whole thereof) of the original Transcript of Record in the above entitled cause.

E. H. Douglas
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Of Attorneys for Plaintiff and Plaintiff in Error.